

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
BEFORE THE HONORABLE LARRY R. HICKS, DISTRICT JUDGE

ORACLE USA, INC., a Colorado :
corporation; ORACLE AMERICA, :
INC., a Delaware corporation; :
and ORACLE INTERNATIONAL : No. 2:10-cv-0106-LRH-PAL
CORPORATION, a California :
corporation, :
Plaintiffs, :
vs. :
RIMINI STREET, INC., a Nevada :
corporation; and SETH RAVIN, :
an individual, :
Defendants. :

TRANSCRIPT OF JURY TRIAL - DAY 16
(Pages 3199 through 3337)

October 5, 2015

Las Vegas, Nevada

Court Reporter: Donna Davidson, RDR, CRR, CCR 318
Certified Realtime Reporter
400 South Virginia Street
Reno, Nevada 89501
(775) 329-0132

1 A P P E A R A N C E S

2 FOR THE PLAINTIFFS:

3 BOIES, SCHILLER & FLEXNER LLP
4 KIERAN P. RINGGENBERG
5 1999 Harrison Street, Suite 900
6 Oakland, California 94612
7 (510) 874-1000
8 Fax: (510) 874-1460
9 kringgenberg@bsfllp.com

7 BOIES, SCHILLER & FLEXNER LLP
8 RICHARD J. POCKER
9 300 South Fourth Street, Suite 800
10 Las Vegas, Nevada 89101
11 (702) 382-7300
12 Fax: (702) 382-2755
13 rpocker@bsfllp.com

11 BOIES, SCHILLER & FLEXNER LLP
12 WILLIAM A. ISAACSON
13 KAREN L. DUNN
14 5301 Wisconsin Avenue, NW
15 Washington, DC 20015
16 (202) 237-2727
17 Fax: (202) 237-6131
18 wisaacson@bsfllp.com
19 kdunn@bsfllp.com

16 MORGAN LEWIS & BOCKIUS LLP
17 THOMAS S. HIXSON
18 NITIN JINDAL
19 JOHN A. POLITO
20 One Market, Spear Street Tower
21 San Francisco, California 94105
22 (415) 442-1000
23 Fax: (415) 442-1001
24 thomas.hixson@morganlewis.com
25 nitin.jindal@morganlewis.com
john.polito@morganlewis.com

22 JAMES C. MAROULIS
23 DORIAN E. DALEY
24 Oracle Corporation
25 500 Oracle Parkway
Redwood City, California 94070
(650) 506-4846
jim.maroulis@oracle.com
dorian.daley@oracle.com

1 A P P E A R A N C E S (Continued)

2 FOR THE DEFENDANTS:

3 SHOOK, HARDY & BACON LLP
4 PETER E. STRAND
5 B. TRENT WEBB
6 RYAN D. DYKAL
7 2555 Grand Boulevard
8 Kansas City, Missouri 64108
9 (816) 474-6550
10 Fax: (816) 421-5547
11 pstrand@shb.com
12 bwebb@shb.com
13 rdykal@shb.com

9 SHOOK, HARDY & BACON LLP
10 ROBERT H. RECKERS
11 600 Travis Street, Suite 3400
12 Houston, Texas 77002
13 (713) 227-8008
14 Fax: (713) 227-9508
15 rreckers@shb.com

13 SHOOK, HARDY & BACON LLP
14 ANNIE Y.S. CHUANG
15 One Montgomery Tower, Suite 2700
16 San Francisco, California 94104-4505
17 (415) 544-1900
18 achuang@shb.com

17 LEWIS ROCA ROTHGERBER LLP
18 W. WEST ALLEN
19 3993 Howard Hughes Parkway, Suite 600
20 Las Vegas, Nevada 89169
21 (702) 949-8230
22 Fax: (702) 949-8364
23 wallen@lrllaw.com

21 JOSEPH A. GORMAN
22 GIBSON DUNN & CRUTCHER
23 555 Mission Street
24 San Francisco, California 94105
25 jgorman@gibsondunn.com

24 BLAINE H. EVANSON
25 GIBSON DUNN & CRUTCHER
333 S. Grand Avenue, 47th Floor
Los Angeles, California 90071
bevanson@gibsondunn.com

1 LAS VEGAS, NEVADA, OCTOBER 5, 2015, 9:12 A.M.

2 --oOo--

3 P R O C E E D I N G S

4

5 (Outside the presence of the jury.)

6 THE COURT: Good morning. Have a seat, please.

7 All right. Well, week four.

8 I see we have some new faces out there. So,

9 counsel, why don't you introduce yourselves for me.

10 Not you, Mr. Isaacson. You can hide under your
11 desk if you'd like.

12 MR. EVANSON: Your Honor, Blaine Evanson, from
13 Gibson Dunn on behalf of the defendants.

14 MR. GORMAN: Good morning, Your Honor. Joseph
15 Gorman from Gibson Dunn on behalf of defendants.

16 THE COURT: All right. And plaintiffs' side.

17 MR. MAROULIS: Good morning, your Honor. James
18 Maroulis from Oracle for Oracle.

19 THE COURT: How do I spell your last name?

20 MR. MAROULIS: M, as in Mary, a-r-o-u-l-i-s, as
21 in Sam.

22 THE COURT: M-a-r-o-u-l-s?

23 MR. MAROULIS: -l-i-s.

24 THE COURT: Okay. I know everyone else.

25 All right. Well, for the benefit of the record,

1 we're in open court. The jury will not be coming in today,
2 and they're excused pending a resolution of instructions
3 and proposed verdict form.

4 I've received various filings by the parties
5 concerning objections to instructions that are
6 self-explanatory, and I understand that there are some --
7 and obviously I've reviewed the filings, and I can see some
8 that are much more substantive than others.

9 But I think probably the easiest thing for me to
10 do is to go through the instructions one by one, ask you if
11 you have any objections or simple knits or suggestions.

12 And if you see one that you believe involves
13 substantive argument along the lines as you've indicated,
14 we'll list them probably in the same order that you gave
15 me. But at least that will keep us on one chronological
16 flow that I can relate to.

17 Some of this is pretty simple stuff, but I still
18 like to have a record that everyone agreed or didn't agree
19 on a particular instruction.

20 So I appreciate the binder that has been given
21 to me this morning because, of course, it starts off with
22 the instructions that the Court had provided counsel with
23 Friday afternoon.

24 And that package represented, for the benefit of
25 the record, the Court's first cut, so to speak, of --

1 through the combined instructions which were offered by
2 both sides. Some were adopted, some were not, others were
3 actually redrafted or supplemented or otherwise proposed by
4 the Court.

5 So, as I understand it, in the upper left-hand
6 corner of instructions that were jointly submitted by the
7 parties, we -- those were identified with a J with their
8 chronological number following.

9 I understand that there are some objections
10 posed, at least by Rimini, to some of the earlier jointly
11 proposed instructions. And we'll deal with that.

12 But other instructions were identified with a D,
13 which represented defense, and a P, which represented
14 plaintiff.

15 And the Court-drafted instructions were not
16 numbered but indicated that they were prepared by the Court
17 or otherwise modified.

18 So all of that stated, the first proposed
19 instruction was J-12, Duty of Jurors at page 5 of the --
20 or, excuse me -- page 5 of the binder, yes.

21 Is there any objection to this instruction?

22 MR. EVANSON: None from defendants.

23 MR. RINGGENBERG: No, Your Honor.

24 THE COURT: All right. The second instruction
25 is P-9, Oracle Entities and Claims. This was modified

1 somewhat by the Court, originally proposed by plaintiff.

2 Is there any objection to that?

3 MR. EVANSON: No, Your Honor.

4 MR. RINGGENBERG: No, Your Honor.

5 THE COURT: The next one is P-7, Corporate
6 Parties, with some modifications that were made by the
7 Court.

8 Any objection?

9 MR. EVANSON: No, Your Honor.

10 MR. RINGGENBERG: No, Your Honor.

11 THE COURT: Okay. The next one is a stock
12 instruction, J-14, What is Evidence.

13 Any objections?

14 MR. EVANSON: No, Your Honor.

15 MR. RINGGENBERG: No, Your Honor.

16 THE COURT: The next one is another stock
17 instruction, J-16, What is Not Evidence.

18 Any objection?

19 MR. EVANSON: No, Your Honor.

20 MR. RINGGENBERG: None here either, Your Honor.

21 THE COURT: The next one, a stock, J-18, Direct
22 and Circumstantial Evidence.

23 Any objection?

24 MR. EVANSON: No objection.

25 MR. RINGGENBERG: None, Your Honor.

1 THE COURT: Next one is Deposition in Lieu of
2 Live Testimony. This was based on a model instruction with
3 some modifications by the Court.

4 Any objection?

5 MR. EVANSON: No objection, Your Honor.

6 On this one we just caught a few little knits
7 that we proposed.

8 THE COURT: And where are -- tell me if you see
9 the knits.

10 MR. EVANSON: First sentence, the second
11 paragraph, it says "your" and it should be "you."

12 THE COURT: Yes.

13 Any others?

14 MR. EVANSON: No.

15 THE COURT: Okay. So there's no objection to
16 that instruction?

17 MR. EVANSON: No objection.

18 MR. RINGGENBERG: Correct, Your Honor.

19 THE COURT: Another stock instruction, J-15,
20 Evidence for a Limited Purpose.

21 Any objection?

22 MR. EVANSON: No objection.

23 MR. RINGGENBERG: None, Your Honor.

24 THE COURT: The next one, J-17, Ruling on
25 Objections.

1 Any objection?

2 MR. EVANSON: No objection.

3 MR. RINGGENBERG: None, Your Honor.

4 THE COURT: Okay. The next one, J-24,
5 Credibility of Witnesses, a stock instruction.

6 Any objection?

7 MR. EVANSON: No objection.

8 MR. RINGGENBERG: None, Your Honor.

9 THE COURT: The next one, I know there was some
10 objection concerning this, Expert Opinion, J-25.

11 Do the parties want to argue this or just --

12 MR. EVANSON: I think our written objections are
13 pretty self-explanatory, Your Honor. It's mostly just for
14 clarification. I don't know that we need --

15 THE COURT: All right.

16 MR. EVANSON: -- extended argument.

17 THE COURT: So basically what I'll do is take it
18 under submission and issue whatever I feel is appropriate.

19 MR. EVANSON: Thank you.

20 THE COURT: I appreciate your deference to that.

21 Next instruction, J-27, Stipulations of Facts.

22 I did review the jury notebook proposal with
23 regarding the facts, and that was satisfactory to the
24 Court.

25 Is there any objection to this instruction?

1 MR. EVANSON: No objection.

2 MR. RINGGENBERG: No, Your Honor.

3 THE COURT: The next one, J-19, Charts and
4 Summaries Not Received in Evidence.

5 Any objection?

6 MR. EVANSON: No objection.

7 MR. RINGGENBERG: None, Your Honor.

8 THE COURT: Okay. The next one, J-20, Charts
9 and Summaries in Evidence.

10 Any objection?

11 MR. EVANSON: No objection.

12 MR. RINGGENBERG: None, Your Honor.

13 THE COURT: The next one, J-21, Use of
14 Interrogatories of a Party.

15 Any objection?

16 MR. EVANSON: No objection.

17 MR. RINGGENBERG: No, Your Honor.

18 THE COURT: The next one, a stock essentially,
19 Redacted Documents.

20 Any objection?

21 MR. EVANSON: No objection.

22 MR. RINGGENBERG: No, Your Honor.

23 THE COURT: The next one, a stock instruction on
24 burden of proof.

25 Any objection?

1 MR. EVANSON: Your Honor, we propose just adding
2 a clarifying sentence, but --

3 THE COURT: Take it under submission?

4 MR. EVANSON: Thank you.

5 THE COURT: Okay. I will do that.

6 The next one, J-13, Burden of Proof - Clear and
7 Convincing Evidence.

8 MR. EVANSON: No objection.

9 MR. RINGGENBERG: No objection.

10 THE COURT: Okay. The next one, joint
11 instruction, Spoliation of Evidence.

12 MR. EVANSON: No objection.

13 MR. RINGGENBERG: No objection.

14 THE COURT: The next one TomorrowNow Evidence
15 with modifications, Plaintiffs' 10-B.

16 MR. EVANSON: Your Honor, we proposed adding two
17 sentences at the end based on the statement that Oracle
18 made in its opposition to our Rule 50(a) motion that they
19 were not relying on the TomorrowNow evidence for punitive
20 damages.

21 I'm not sure that -- I think our suggestion is
22 pretty self-explanatory.

23 THE COURT: Okay. I'll take that under
24 submission.

25 Customer Surveys, P-53.

1 MR. EVANSON: We proposed striking this, this
2 instruction, Your Honor, because the discussion was not --
3 or the case law cited and the discussion was not about the
4 actual -- the actual surveys were not admitted at trial, it
5 was only testimony about the surveys.

6 And Your Honor mentioned in the sidebar
7 discussions that the discussion about the surveys was fully
8 admissible, and so we thought that this instruction just
9 may add confusion. But we can stand on what's in the
10 papers.

11 MR. ISAACSON: Your Honor will recall that one
12 witness from Rimini was allowed to testify as to the actual
13 level of satisfaction of the surveys, which is what's
14 caused the need for this instruction.

15 THE COURT: Okay. I understand the arguments.
16 I have reviewed the filings, and I'll make a decision
17 without having to make further argument.

18 Next instruction, P-11, Copyright - Introduction
19 and Definitions.

20 MR. EVANSON: We proposed a few changes, Your
21 Honor, but we'll stand on our written objections.

22 THE COURT: Okay. And plaintiff?

23 MR. RINGGENBERG: No objections on these, Your
24 Honor.

25 THE COURT: Okay. As you can see from the

1 Court's overview instruction, I that felt it was critical
2 that we have an instruction in here that gave the jury a
3 sense of their overall charge in this case, and this is
4 what I offered, and I know that there's been comment both
5 ways.

6 Is this something you'd like to have oral
7 argument on?

8 MR. EVANSON: Not defendants, Your Honor.

9 MR. HIXSON: No, Your Honor.

10 THE COURT: Okay.

11 So it's considered acceptable by both sides?

12 MR. EVANSON: We proposed a few modifications in
13 writing, but I don't think anything --

14 THE COURT: Okay.

15 MR. EVANSON: -- that we need to take the
16 Court's time with.

17 THE COURT: Okay. The next one, D-8,
18 Copyright - Direct Infringement. Modifications were made
19 by the Court.

20 What's the parties view with regard to this one?

21 MR. HIXSON: Your Honor, Oracle has submitted an
22 objection to D-8 to clarify which product lines are still
23 in dispute for the jury; namely, JD Edwards, Siebel, and
24 PeopleSoft documentation.

25 We think our written objections adequately set

1 forth the basis of our objection.

2 THE COURT: Okay. I will take that under
3 submission.

4 Page 33, Copyright - Express License. This was
5 a Court-proposed instruction. I know I've received -- this
6 is one you want to have oral argument on; right? Or not?

7 MR. EVANSON: I believe so. Mr. Reckers is --

8 MR. RECKERS: Yes, Your Honor.

9 THE COURT: Okay. We'll come back to that one.

10 MR. RECKERS: Okay.

11 THE COURT: All right. The next one, P-15,
12 License Interpretation - Parol Evidence.

13 MR. EVANSON: Our suggestion, Your Honor, was
14 that this instruction not be given because the motivation
15 for it, at least in the motions in limine, was defendants'
16 industry custom and practice evidence that plaintiffs were
17 worried would encourage the jury to rely on for
18 interpretation of the licenses, and since that evidence
19 didn't come in, we don't think this instruction is
20 necessary.

21 THE COURT: All right.

22 MR. HIXSON: And, Your Honor, Oracle disagrees
23 because there's been testimony by Mr. Ravin and others
24 about what they believed the licenses mean as distinct from
25 what they may actually have meant, and we think this would

1 help clarify that that "believe" evidence should not be
2 taken into account in determining the meaning of the
3 licenses.

4 THE COURT: Okay. All right. Your comment
5 triggered my recollection on what I'd read. And I'll take
6 that under submission and give you a ruling on it.

7 The next one, P-16, Copyright - Contributory
8 Infringement.

9 MR. EVANSON: We had a few written suggestions,
10 Your Honor, and we'll stand on what's in our papers.

11 THE COURT: Plaintiffs?

12 MR. HIXSON: No objection, Your Honor.

13 THE COURT: Okay. The one next one, P-17,
14 Copyright - Vicarious Infringement.

15 MR. EVANSON: Same thing there, Your Honor. We
16 had a few written suggestions, but we'll stand on what's in
17 our papers.

18 THE COURT: Okay.

19 MR. HIXSON: And, again, plaintiff has no
20 objection to the Court's proposed instruction here.

21 THE COURT: The next one, Copyright Damages -
22 Introduction. This was an instruction proposed by the
23 Court.

24 MR. GORMAN: We had just a few suggested
25 modifications, Your Honor, but we agree with the

1 instruction in substance.

2 THE COURT: All right.

3 MR. RINGGENBERG: And for the plaintiffs, Your
4 Honor, we have an overarching issue about whether the fair
5 market value theory is presented to the jury, which is
6 addressed by a number of instructions in the section.

7 But other than that, we don't have an objection
8 on this particular instruction.

9 THE COURT: Okay. Well, I'll include it in that
10 group that concerned that question, because we will have
11 oral argument on that.

12 Is that agreed upon by everyone on that issue
13 that you've just identified?

14 MR. RINGGENBERG: Yes, Your Honor.

15 THE COURT: Mr. Ringgenberg?

16 MR. RINGGENBERG: Would you like to hear that
17 now or later, Your Honor?

18 THE COURT: Well, let's identify the ones we
19 have for -- that concern sufficient issues for oral
20 argument.

21 All right. The next one, Copyright
22 Infringement -- and I'm going to call this last category,
23 for everyone's benefit, argument number two.

24 I listed the first one as argument number one
25 based on that argument number one concerned copyright

1 express license. Argument number two will involve, in this
2 case, Copyright Damages - Introduction.

3 But what's the better topic for this argument,
4 Mr. Ringgenberg?

5 MR. RINGGENBERG: I would say fair market value,
6 theory of damages.

7 THE COURT: And the next one, Copyright
8 Infringement - Actual Damages.

9 MR. EVANSON: Defendants' have just a few
10 proposed modifications, but we don't need argument on it,
11 Your Honor.

12 THE COURT: Okay.

13 MR. RINGGENBERG: No objections from plaintiffs,
14 Your Honor.

15 THE COURT: The next one, P-18, Copyright
16 Damages - Causation.

17 MR. EVANSON: Your Honor, defendants suggest
18 striking this instruction because causation is dealt with
19 in the other instructions, and so we didn't think this one
20 was necessary.

21 THE COURT: Okay. I'll take that under
22 submission. I recall that argument.

23 MR. RINGGENBERG: And we have no objection to
24 that instruction, Your Honor.

25 THE COURT: All right. The next one, Copyright

1 Damages - Lost Profits.

2 MR. EVANSON: Defendants have just a few --
3 well, one knit in the first sentence. "Your" should be
4 "you."

5 THE COURT: Okay.

6 MR. EVANSON: And then the other suggestion to
7 refer, when talking about causation, to the causation
8 instruction that follows.

9 MR. RINGGENBERG: And from the plaintiffs' side,
10 Your Honor, we have the other side of the coin, which is
11 there's two competing instructions on causation, and we
12 think the other one is more accurate.

13 THE COURT: Okay. Let's list that as argument
14 three.

15 Give me a good mutual acceptable description of
16 that argument.

17 MR. RINGGENBERG: Lost profits causation.

18 MR. EVANSON: That's exactly what I was going to
19 say, Your Honor.

20 THE COURT: Okay. Argument three will concern
21 lost profit causation.

22 The next one, Copyright Damages - Oracle's Lost
23 Profits - Causation.

24 Same thing?

25 MR. EVANSON: We have no objection to this one.

1 MR. RINGGENBERG: It's the same issue, Your
2 Honor.

3 THE COURT: Okay. That will be A-3.
4 The next one, Copyright Damages - Defendants'
5 Profits.

6 MR. EVANSON: Defendants had a few suggestions,
7 but we'll stand on our papers.

8 THE COURT: Okay.

9 MR. RINGGENBERG: And from our point of view,
10 this addresses argument A-2, Your Honor.

11 THE COURT: Okay. The next one, Copyright
12 Damages - Fair Market Value License.

13 MR. EVANSON: Defendants' had just a few, again,
14 suggestions, and we rest on our papers.

15 MR. RINGGENBERG: Your Honor, I think I
16 misspoke. I flipped a page too aggressively.

17 This is the one that relates to argument A-2.
18 We don't have any objection to -- we did make an objection
19 on the previous instruction, Defendants' Profits, but we're
20 happy to stand on our papers on that.

21 I apologize for that confusion.

22 THE COURT: Okay. So it's not an A-2 argument,
23 it's just the objection noted in your papers; right?

24 MR. RINGGENBERG: Correct, Your Honor.

25 THE COURT: Okay. So the next one is the A-2

1 argument; is that right?

2 MR. RINGGENBERG: Yes, Your Honor.

3 THE COURT: Okay.

4 All right. The next one, Copyright Damages -
5 Statutory Damages.

6 MR. EVANSON: Defendants' propose just a few
7 extra sentences to explain the calculation of statutory
8 damages to the jury. But we'll rest on our papers.

9 THE COURT: All right.

10 Oracle?

11 MR. HIXSON: Oracle does not object to the
12 Court's proposed instruction.

13 THE COURT: Okay. The next one, Copyright
14 Damages - Innocent Infringement.

15 MR. EVANSON: No objection.

16 MR. HIXSON: No objection.

17 THE COURT: The next one, Copyright Damages -
18 Willful Infringement.

19 MR. EVANSON: No objection.

20 MR. HIXSON: No objection.

21 THE COURT: The next one, Inducing Breach of
22 Contract.

23 MR. EVANSON: We propose some edits to this
24 instruction, Your Honor, for clarification.

25 I believe Oracle wants argument on this one. We

1 would -- and if that's true, then we will argue it as well.
2 If not, then we will rest on our papers.

3 THE COURT: Okay.

4 MR. RINGGENBERG: That's correct, Your Honor.
5 We would like to address this. I think a good way to
6 describe it is the elements of our tort claims.

7 THE COURT: Okay. And the best description for
8 this is our new A-4?

9 MR. RINGGENBERG: Yes, Your Honor.

10 THE COURT: What would you give me for -- breach
11 of contracts?

12 MR. RINGGENBERG: Elements of our -- of Oracle's
13 tort claims.

14 THE COURT: Elements for Oracle's tort claims.
15 Okay. All right. That will be A-4.

16 Next instruction, Intentional Interference with
17 Prospective Economic Advantage.

18 MR. EVANSON: I believe this is the same one as
19 the last one, Your Honor. I think we both want to hear --
20 we want argument on it.

21 MR. RINGGENBERG: Correct, Your Honor.

22 THE COURT: Okay. And this we'll just call
23 economic advantage?

24 MR. RINGGENBERG: Correct, Your Honor.

25 THE COURT: A-5.

1 MR. RINGGENBERG: It's really the same issue as
2 A-4, Your Honor.

3 THE COURT: Okay. The next one is Intentional
4 Interference - Existence of Relationship?

5 MR. EVANSON: Defendants had a few proposed
6 modifications, but we will rest on our papers.

7 MR. RINGGENBERG: No objections from Oracle,
8 Your Honor.

9 THE COURT: Okay. That will go under
10 submission.

11 Next one is Inducing Breach of Contract and
12 Intentional Interference - Knowledge.

13 MR. EVANSON: Same thing here, Your Honor. We
14 will rest on our papers.

15 MR. RINGGENBERG: No objection, Your Honor.

16 THE COURT: Okay.

17 The next one is Inducing Breach of Contract and
18 Intentional Interference.

19 MR. EVANSON: This one too, Your Honor, we
20 proposed a few modifications, and we'll rest on our papers.

21 MR. RINGGENBERG: No objections, Your Honor.

22 THE COURT: All right. The next one is Inducing
23 Breach of Contract and Intentional Interference -
24 Causation.

25 MR. EVANSON: No objection, Your Honor.

1 MR. RINGGENBERG: No objection.

2 THE COURT: The next one is Intentional
3 Interference with Prospective Economic Advantage.

4 MR. EVANSON: No objection.

5 MR. RINGGENBERG: No objection.

6 THE COURT: The next one is Inducing Breach of
7 Contract and Intentional Interference.

8 MR. EVANSON: We proposed some edits to this
9 one, Your Honor, but we will rest on our papers.

10 MR. RINGGENBERG: No objection.

11 THE COURT: The next one is Federal Computer
12 Fraud and Abuse Act - Introduction.

13 MR. EVANSON: On this one, Your Honor, and there
14 are about -- I think there are about 15 instructions on the
15 computer hacking claims. We would request arguments. It's
16 on just a couple issues that apply across all of them.

17 THE COURT: Okay. So that will be a new
18 category, A-5, and we'll call it -- give me a good short
19 title for that, Counsel.

20 MR. EVANSON: Computer access claims.

21 MR. HIXSON: And there's no objection from
22 Oracle to these computer claim proposed instructions.

23 THE COURT: Okay. So that -- A-5 would cover
24 the next instruction as well; is that correct?

25 MR. EVANSON: Correct, Your Honor.

1 THE COURT: Is there anything in it besides
2 those objections?

3 MR. EVANSON: No, Your Honor.

4 THE COURT: Okay. And no objection from Oracle;
5 is that correct?

6 MR. HIXSON: Correct, Your Honor.

7 THE COURT: Then P-31, Federal Computer Fraud
8 and Abuse Act, same thing, no objection from Oracle and
9 we'll argue under A-5?

10 MR. EVANSON: Correct.

11 MR. HIXSON: Correct, Your Honor.

12 THE COURT: P-32, Federal Computer Fraud and
13 Abuse Act - Intentional Damage to Computer.
14 Same thing?

15 MR. EVANSON: Same thing, Your Honor.

16 MR. HIXSON: Same thing, Your Honor.

17 THE COURT: That will be A-5.

18 Federal Computer Fraud and Abuse Act - Reckless
19 Damage to Computer, A-5; is that correct?

20 MR. EVANSON: That's correct, Your Honor.

21 THE COURT: Any objection from Oracle?

22 MR. HIXSON: No, Your Honor.

23 THE COURT: The next one, Federal Computer Fraud
24 and Abuse Act - Damages, that's an A-5 argument; is that
25 right?

1 MR. EVANSON: This one, actually, Your Honor, we
2 proposed just one modification, and we're happy to rest on
3 our papers on that one. It doesn't have the same issue as
4 the other instructions we --

5 THE COURT: Okay.

6 MR. HIXSON: No objection from Oracle as to this
7 proposed instruction.

8 THE COURT: The next one, California Computer
9 Data Access and Fraud Act. Is this an A-5?

10 MR. EVANSON: This one we don't need argument,
11 Your Honor. It's just a minor modification, correction.

12 THE COURT: No objection from Oracle?

13 MR. HIXSON: There isn't. Oracle concurs in the
14 modification, which is to change the word three to the word
15 two.

16 THE COURT: So both sides agree on the change on
17 this; is that right?

18 MR. HIXSON: I believe so.

19 MR. EVANSON: Yes, Your Honor.

20 THE COURT: All right. And that will be done,
21 I'm sure. But I'll take a look at it.

22 California Computer Data Access and Fraud Act.
23 Is this an A-5?

24 MR. EVANSON: Your Honor, we have no objection
25 to this instruction.

1 THE COURT: Okay.

2 MR. HIXSON: Neither does Oracle.

3 THE COURT: All right. Thank you.

4 The next one, California Computer Data Access
5 and Fraud Act - Section 2.

6 MR. EVANSON: This is A-5, Your Honor.

7 THE COURT: Okay.

8 MR. HIXSON: No objection from Oracle.

9 THE COURT: The next one is California Computer
10 Data Access and Fraud Act - Section 3.

11 MR. EVANSON: This is an A-5 instruction, Your
12 Honor.

13 THE COURT: All right.

14 MR. HIXSON: No objection from Oracle.

15 THE COURT: The next one is California Computer
16 Data Access and Fraud Act - Assisting, Aiding and Abetting.
17 A-5?

18 MR. EVANSON: A-5, Your Honor.

19 MR. HIXSON: No objection from Oracle to the
20 instruction.

21 THE COURT: The next one is California Computer
22 Data Access and Fraud Act - Damages.

23 MR. EVANSON: No objection to this one, Your
24 Honor.

25 MR. HIXSON: No objections.

1 THE COURT: Okay. The next one, Nevada Computer
2 Crimes Act -- or Crimes Law.

3 MR. EVANSON: No objections, Your Honor.

4 MR. HIXSON: No objections.

5 THE COURT: The next one, Nevada Computer Crimes
6 Law - Definitions.

7 MR. EVANSON: This is an A-5, Your Honor.

8 MR. HIXSON: No objections from Oracle.

9 THE COURT: The next one, Nevada Computer Crimes
10 Law - Section 1.

11 MR. EVANSON: This would fall under A-5, Your
12 Honor.

13 THE COURT: Okay.

14 MR. HIXSON: No objections from Oracle.

15 THE COURT: The next one is Nevada Computer
16 Crimes Law - Section 3. A-5?

17 No objection from Oracle?

18 MR. EVANSON: Correct, Your Honor.

19 MR. HIXSON: Correct.

20 THE COURT: The same would be with the next one,
21 Nevada Computer Crimes Law - Damages?

22 MR. EVANSON: We have no objection to this one,
23 Your Honor.

24 THE COURT: Okay.

25 MR. HIXSON: No objection by Oracle.

1 THE COURT: All right. The next one is Damages,
2 Punitive Damages - Liability.

3 MR. EVANSON: On this one, Your Honor, we have
4 just a minor modification, and we can rest on our papers.
5 But we'd like to have argument on punitive damages,
6 generally, some additional -- the additional instructions
7 that we've proposed.

8 THE COURT: Okay.

9 MR. EVANSON: That would be A-6, punitive
10 damages.

11 THE COURT: All right.

12 MR. HIXSON: And there's no objection from
13 Oracle on the Court's punitive damages instructions.

14 THE COURT: Okay. The next one is -- well,
15 let's see. Should that -- should those additional ones be
16 listed as an argument item?

17 MR. EVANSON: The additional punitive damages
18 instruction should, Your Honor, yes.

19 THE COURT: All right. We'll call that A-6.

20 Punitive Damages - Officer, Director, or
21 Managing Agent.

22 MR. EVANSON: No objection to this one, Your
23 Honor.

24 MR. HIXSON: No objection, Your Honor.

25 THE COURT: The next one, Return of Verdict.

1 MR. EVANSON: No objection, Your Honor.

2 MR. HIXSON: No objection.

3 THE COURT: The next one, Duplicative Damages,
4 with Modifications.

5 MR. EVANSON: No objection.

6 MR. HIXSON: No objection.

7 THE COURT: The next one, Communication with the
8 Court.

9 MR. EVANSON: No objection.

10 MR. HIXSON: No objection.

11 THE COURT: The next one, Duty to Deliberate.

12 MR. GORMAN: No objection.

13 MR. HIXSON: No objection.

14 THE COURT: Okay. All right. So we have six
15 different topics for argument items.

16 Why don't we just stick with the chronological
17 order that we placed those in.

18 MR. RINGGENBERG: Your Honor, can I raise one
19 additional point, please, which is there's one additional
20 instruction we asked the Court to provide the jury with
21 respect to how TomorrowNow and CedarCrestone fit into the
22 damages issues.

23 THE COURT: Okay. We'll call that CedarCrestone
24 and TomorrowNow.

25 MR. RINGGENBERG: Thank you, Your Honor.

1 THE COURT: And that will be an argument item?

2 MR. RINGGENBERG: Yes, please, Your Honor.

3 THE COURT: So that will be A-7.

4 Okay. So going back to the first one, Copyright
5 and Express License, Court instruction. I didn't make a
6 note concerning who was the most objecting party here.
7 Perhaps you're in agreement as to who the most objecting
8 party is, and I'll let them go first.

9 MR. RECKERS: Well, I think Oracle has the most
10 substantive additions to this, though I'm happy to go
11 first.

12 THE COURT: Okay. Let's go -- let's start with
13 plaintiff then.

14 MR. ISAACSON: So, Your Honor, with respect to
15 the express license instruction, we're talking about
16 PeopleSoft, JDE, and Siebel.

17 Now, with respect to -- let's start with
18 PeopleSoft.

19 THE COURT: Wait a minute. Let me -- I'm going
20 to find your objections on this in the binder.

21 Which number is it in -- the section under
22 Oracle in the binder?

23 MR. ISAACSON: This is express license court
24 instruction, which would be --

25 THE COURT: It's at page 4. I see it.

1 Okay. Go ahead, Mr. Isaacson.

2 MR. ISAACSON: All right. Now, with respect to
3 PeopleSoft, the Court has proposed instructing that as a
4 matter of law the defendant, Rimini Street, engaged in
5 copyright infringement of PeopleSoft software.

6 Now, we have the issue, of course, of PeopleSoft
7 documentation, but separately from that the -- there has
8 been a great deal of testimony in the case about the
9 meaning and interpretation of the actual PeopleSoft
10 licenses, and including things like 14.2, which talks about
11 access and use, rather than copying, and which the Court
12 already held on summary judgment is basically irrelevant to
13 the copyright issue.

14 And the jury has seen the provisions of the
15 PeopleSoft contract shown to them by both sides, first by
16 Rimini, and then a reply by Oracle, with respect to the
17 location of the software, and then the restriction that it
18 be used for the internal operations.

19 And so we proposed a paragraph -- a paragraph
20 that explained what the Court had ruled before.

21 Now, in looking at that paragraph, brevity is
22 always better, and we think our paragraph is too long, and,
23 in fact, all that would be necessary would be the second
24 sentence of our proposed paragraph.

25 And if you have -- I don't know if you have the

1 red-lined paragraph in front of you, which is page 7 of our
2 proposed --

3 THE COURT: Blue-lined, but go ahead.

4 MR. ISAACSON: Proposed changes, it's at the
5 second tab in the binder. So what we would propose is the
6 second sentence there.

7 "The PeopleSoft software licenses prohibited
8 Rimini Street from copying, preparing derivative works
9 from, or distributing PeopleSoft software other than to
10 support the specific licensee's own internal data
11 processing operations on the licensee's own computer
12 systems."

13 That would give clear and precise instruction as
14 to the meaning of the PeopleSoft licenses as opposed to an
15 instruction that just says there was copyright infringement
16 without explanation.

17 So that's what we're proposing there.

18 Now, in addition, in the following two
19 paragraphs, and it's helpful to look at the red-line at
20 this point, which would be page 8 of the red-line where
21 we're talking about PeopleSoft documentation.

22 So those paragraphs are now addressing the
23 PeopleSoft documentation issue, and it only picked -- the
24 Court's instruction only picked up one of the two license
25 restrictions, internal use, and we have added in red-line

1 "and at the customer's facilities," because that's a proper
2 interpretation of the licenses.

3 And so we've done that in the next two
4 paragraphs on that page. You can see that red line.

5 So that would conform the PeopleSoft
6 documentation instruction to the Court's prior orders.

7 We are unclear at this point as to what actual
8 license defense there is for the PeopleSoft documentation
9 given the Court's prior summary judgment order.

10 There's been no identification of any other
11 provision that would protect the documentation as opposed
12 to the software distinguishing the two somehow.

13 And so, you know, as part of -- right now, I
14 don't know why they don't -- there's not just a ruling as a
15 matter of law on the documentation or what provision
16 they're intending to rely on.

17 But if we're going to be putting in the
18 PeopleSoft license on the documentation issue, it should
19 obviously include both of the restrictions.

20 THE COURT: All right.

21 Okay. Mr. Reckers?

22 MR. RECKERS: Your Honor, our objections to
23 these additions largely flow from the fact that they seek
24 to expand what the judge -- what Your Honor actually ruled
25 in your February 2014 order.

1 The issue in that particular order was the local
2 copying of the PeopleSoft programs. They moved on certain
3 software environments that were on Rimini's system, and the
4 Court held as a matter of law, using section 1.1 of the
5 license agreements, that the local copying, the copies on
6 Rimini servers, were -- constitute infringement.

7 What defendants have proposed now is -- I'm
8 sorry, what plaintiffs now propose is expanding that ruling
9 to cover things such as derivative works, distributions
10 from the update process, that simply were not part of the
11 Court's order.

12 From Rimini's perspective, the Court's order was
13 dispositive on all of the issues of copying, and so the
14 jury does not need to be instructed, and it would be
15 actually confusing to hear about things such as derivative
16 works and distributions, simply wasn't part of the Court's
17 order, and so it's not necessarily a basis that -- for
18 instruction at this point.

19 The jury should be told is what's otherwise in
20 the instruction what the judge actually -- what Your Honor
21 actually said earlier in the case. The Court's order was
22 that there was infringement. That's all they need to know.
23 They don't need to get into the nuances of some of the
24 other infringement theories that weren't actually -- didn't
25 need to be litigated at this trial.

1 On the documentation, Rimini's position is that
2 the Court's original construction -- instruction was
3 correct, and the facilities language is not appropriate.

4 If you look at the license agreements for
5 PeopleSoft, and we cite Your Honor specifically to
6 Plaintiffs' Exhibit 698, which is the City of Flint license
7 which is one of the exemplary ones that the parties have
8 agreed to, you'll see that it treats documentation
9 separately at section 1.3 from the software.

10 If Rimini's -- with respect to the proper
11 interpretations license, is to continue to divide out
12 software and documentation. I recognize that the
13 definition of software in the license agreement includes
14 documentation.

15 I further recognize that the Court held in the
16 summary judgment order that section 1.1 covers the universe
17 of the grant, basically, that everything falls under 1.1.

18 Respectfully, Rimini disagrees with that
19 reading, and we would submit that section 1.3, it's on page
20 1 of Plaintiffs' Exhibit 698, is a separate, independent
21 grant. That grant breaks up documentation separately and
22 allows for -- and does not include the facilities
23 limitation that plaintiffs are suggesting we add in.

24 THE COURT: All right. I will take a look at
25 that.

1 MR. ISAACSON: May I say one more thing, Your
2 Honor?

3 THE COURT: Yes.

4 MR. ISAACSON: Because counsel is leaving me
5 puzzled as to what we're doing with PeopleSoft other than
6 the software in this case.

7 We agree that the Court in its summary judgment
8 decision did not reach beyond the software. All right.
9 That doesn't mean that the Court didn't interpret the
10 license agreement.

11 And unless you put forward some provision of the
12 license agreement that would treat derivative works or
13 distribution or, for that matter, documentation, this issue
14 should not -- none of those issues should go to the jury,
15 and the jury should be so instructed.

16 Now, specifically with respect to the City of
17 Flint license, section 1.1, which is what the Court
18 interpreted, expresses restrictions on the licensee on how
19 they use the software.

20 And then there is, as counsel acknowledged, a
21 definition of software that includes the term
22 documentation.

23 So when the Court ruled on software, while it
24 didn't -- you know, it didn't have the issue of
25 documentation technically before it, within the definition

1 of software in the license agreement, it says software
2 includes documentation.

3 So there really isn't an argument that 1.1
4 wouldn't apply to documentation. So I'm not -- and I'm not
5 even hearing what's going to be -- and I'm somewhat
6 concerned about this because I'm not hearing what's going
7 to be said in closing argument.

8 And we do have some concerns, you know, like any
9 counsel, I don't like objecting during closing argument. I
10 would not like to hear legal arguments that have been
11 foreclosed in closing argument about, for example,
12 documentation, and I have no understanding at this point as
13 to what their defense is on documentation.

14 MR. RECKERS: I'm happy to respond to that, Your
15 Honor.

16 I think Mr. Isaacson and I have both identified
17 the legal dispute. I think we've both pointed to the
18 provisions.

19 I cited 1.3 in support of my client's position,
20 and, obviously, if we get closing tomorrow, you know,
21 however Your Honor rules on this instruction, we'll abide
22 by it.

23 So if Your Honor includes the facility
24 limitations, we will not make this argument. If Your Honor
25 doesn't, then we'll make the argument that I'm suggesting,

1 that documentation is treated differently.

2 So I think it's teed up before Your Honor now,
3 which I think solves Mr. Isaacson's question about closing
4 and would avoid the instruction.

5 My client's position is that documentation was
6 not covered by the Court's order, and if the Court seeks to
7 extend its order, then, so be it.

8 But, as it stands now, we don't believe that
9 documentation was raised in the summary judgment, we don't
10 believe that's, respectfully, a proper interpretation of
11 1.1, its applicability to the further language in the
12 question; but, obviously, we'll abide by whatever Your
13 Honor's guidance on this question is.

14 THE COURT: Okay. What I intend to do is I want
15 to hear from you on these arguments, and then I'll take
16 them under submission, and we'll run a proposed final set
17 that I'll get to you at a time when I can see that we'll
18 have a chance, one, for you to digest what we've done, and,
19 two, give you a final opportunity and -- if you think that
20 we've missed something.

21 MR. ISAACSON: So just to be clear as to
22 plaintiffs' position at this point -- and I appreciate
23 counsel clarifying.

24 They're making quite clear that their only
25 argument in closing would be to argue a section of the

1 license agreement, 1.3, which we think is foreclosed by the
2 license agreement itself which has been interpreted by the
3 Court; agreed, not with documentation. This is the first
4 time the Court will interpret it.

5 But the interpretation that's put forward is
6 untenable under the license agreement and inconsistent with
7 the Court's ruling with respect to software, so this issue
8 should not go to the jury.

9 The Court's instruction with regards to
10 PeopleSoft software should be -- should now say "and
11 documentation," and the documentation issue should not be
12 submitted to the jury.

13 THE COURT: All right. Well, your respective
14 arguments remind me of why I felt that this instruction was
15 necessary, because I -- as I heard the evidence start to be
16 presented and was mindful of my earlier summary judgment
17 motion, I was concerned about software versus documentation
18 and where that all fell into the picture. But I'll take a
19 look at it and let you know.

20 MR. RECKERS: And, Your Honor, Rimini had
21 several fairly minor additions that I'm happy to address
22 with Your Honor quickly.

23 THE COURT: Okay.

24 MR. RECKERS: And those actually related to the
25 JD Edwards and the Siebel portions.

1 THE COURT: All right. Let me get down to --
2 what page on your objections in the binder are we looking
3 at?

4 MR. RECKERS: We'll be starting at page 9 of
5 Rimini's objections, the red lines that go on 9 and 10.

6 THE COURT: Okay. All right.

7 MR. RECKERS: And, Your Honor, there's really
8 just two issues.

9 We had added -- so to start with the JD Edwards,
10 we added the context of the engagement of the support
11 provider into the license -- or into the license
12 instruction.

13 And the point here, and this was an issue in the
14 summary judgment, we think it's proper for the jury to be
15 instructed that the licenses did allow for the support
16 provider to make the copies on their system.

17 That was consistent with Your Honor's denial of
18 Oracle's summary judgment request for this particular --
19 for these two particular pieces of software.

20 And in particular, for example, the service or
21 the support aspect of it, it's also reflected in the
22 pertinent license agreement in the -- for example, in the
23 JDE agreement that's before the Court.

24 THE COURT: What is the exhibit on that?

25 MR. RECKERS: It's Plaintiffs' Exhibit 704, Your

1 Honor.

2 THE COURT: Okay. Go ahead.

3 MR. RECKERS: And I'll cite you to -- it's on
4 the first page. It's Article VII, subpart Roman numeral
5 III.

6 So this has to do with copying the
7 documentation. It's allowed to the extent necessary for
8 customers' archival needs and to support the user.

9 So we had suggested adding the portion regarding
10 support because it is expressly in the license agreement.

11 And the second point, again, this is
12 consistent -- this is throughout -- this is applicable to
13 both Siebel and JD Edwards, is the Court's proposed
14 definition of archival copy.

15 From Rimini's perspective, the definition's
16 unnecessary. It does not -- such a definition does not
17 appear in the license agreement themselves.

18 And it's a bit confusing. It uses the term
19 "unmodified copy." And as we heard in trial from many
20 witnesses on both sides, this software actually is heavily
21 modified, and obviously you'd need to keep for your
22 production system a backup of the modified version of the
23 changes.

24 So we would submit that the definition is not
25 consistent with the evidence. The archival definition is

1 not consistent with the evidence.

2 The unmodified copy actually wouldn't be that
3 helpful because you have to modify this software, and we
4 believe the evidence supports that Rimini kept archival
5 copies that were modified in support of its users in case
6 there were -- was a need to go to the backup to do things
7 like fix bugs in the program, or to restore the client's
8 own production system.

9 So we would suggest removal of the archival copy
10 definition from Your Honor's instruction.

11 THE COURT: Okay.

12 All right. The Oracle response to that?

13 MR. ISAACSON: So, we're again getting to an
14 issue as to the intersection of the jury instructions, the
15 case, and what's going to be argued in closing argument.

16 The -- as Your Honor noted, this -- this has
17 been, frankly, a puzzling trial given the lack -- the utter
18 lack of attention given to Your Honor's summary judgment
19 order.

20 Your Honor sent the JDE and Siebel cases to
21 trial based on whether they were archival backups,
22 emergency backups, and noted that there was evidence that
23 said -- on both JDE and Siebel, where the defendant was
24 saying we don't use these things, so maybe these were just
25 backups.

1 Now, as the evidence has developed at trial,
2 they said we do use these, both the Siebel and the JDE
3 environments.

4 And everybody's agreed what was in the summary
5 judgment order, that a backup is an unmodified copy, it's
6 something you put on the shelf for safekeeping, and that
7 this definition of a customized backup is clearly not what
8 the license is talking about because you're talking about a
9 backup of our software.

10 If you accept that they're customizing it,
11 they're no longer backing it up. The most that he can be
12 talking about is they also had some backups of their
13 customizations, which is completely irrelevant.

14 They don't have a defense of -- there's no
15 defense in the license agreement or backups of
16 customizations.

17 Now, the Giant Cement license, as Mr. Reckers
18 says, they are relying on the provision of 7.3, and they
19 are arguing an interpretation that's inconsistent with the
20 summary judgment decision, because the language that
21 they're hanging their hat on says archival needs and to
22 support the users.

23 They want it to be "or." They want to be able
24 to just say to support the users.

25 All right? It's not a disputed -- the only

1 issue -- and as the Court identified in the summary
2 judgment order -- that goes to the jury is whether they --
3 these are being used to meet archival needs, which all the
4 evidence says that it's not, is not happening.

5 And then, obviously, the Court has
6 interpreted -- and, obviously, the Giant Cement license
7 also has the provisions about, you know, having to be on
8 the system and being for internal use only.

9 But with regard to that one provision, the Court
10 has said what we're going to have a trial about is whether
11 these are backups or archives.

12 The most I'm hearing from Mr. Reckers is we're
13 going to come up with a new definition of archives that's
14 fundamentally different from the Court's summary judgment
15 order, and that's the language they want stricken.

16 All right? They don't want backups to mean
17 backups anymore. From what I'm hearing, they want it to --
18 they don't want it to mean backups of Oracle software, they
19 want it to mean backups of customizations, right, which by
20 definition is not a backup of Oracle software.

21 This is -- I don't actually -- we said this in
22 our Rule 50 motion, but I don't understand why the JD
23 Edwards issue is going to -- on liability, or the Siebel
24 issue, is going to the jury, because they are no longer --
25 they are not making the argument they made on summary

1 judgment.

2 In summary judgment they made the argument there
3 was a deposition saying -- reference that the Court cited
4 in both respect to JDE and Siebel saying we don't use these
5 things. All right?

6 Mr. Ravin has said they used them. Other
7 witnesses said that they use them. They use the
8 environments for support, which means they're no longer
9 unmodified copies.

10 Both sides, people are testifying that's not a
11 backup, you put the backup tapes on a shelf, leave it pure
12 and simple so that it's not tampered with.

13 And so I don't think that what they're asking
14 you to do is consistent with the Court's order, and that's
15 why they need that language stricken. They're trying to
16 change the definition of backup from the Court's order, and
17 that's specifically document 474 at 22.

18 On a more minor note, with respect to the actual
19 instruction, we had one suggestion that's not in our papers
20 that's probably not substantive for the jury.

21 But if you look at the second paragraph of the
22 Court's proposed JD Edwards software license agreements
23 instruction -- well, actually, I was going to make a
24 scrivener's point. I'll leave it alone.

25 THE COURT: Okay.

1 MR. RECKERS: Your Honor, may I?

2 THE COURT: Yes, Mr. Reckers.

3 MR. RECKERS: It's probably helpful, Your Honor,
4 to now break these two apart because there are differences
5 between the two software -- two pieces of software and how
6 they're used at Rimini Street, and obviously the licenses
7 have differences that were noted on the summary judgment.

8 So to start with JD Edwards -- and, again, this
9 is -- the license that we've been discussing is Plaintiffs'
10 Exhibit 704.

11 The provision that we're relying on, you know,
12 says archival needs in support of the users, and what the
13 testimony has been is that Rimini keeps -- they even call
14 it an archive, an archive of software and support material
15 to support the users.

16 And they don't necessarily use it for disaster
17 recovery. What they use it for is to support the user,
18 say, when a bug arises, and they look in their archive, and
19 they see if they have a copy of the bug fix.

20 I would submit that the jury can apply the
21 license agreement and say is that an archive to support the
22 users, and then that's appropriate under Your Honor's
23 previous construction in the summary judgment order.

24 The partner support is that this is not
25 necessarily just unmodified code for disaster recovery. If

1 you look at the license agreement, there's a separate
2 provision for disaster recovery, and that's section 5 on
3 the same page, number 5 of article 2.

4 So just up the page a little bit, it says the
5 customer may provide for disaster recovery services on a
6 computer, so on and so forth, and there's some provisions
7 about disaster recovery.

8 So I would submit to Your Honor that the license
9 itself allows for archival use to support users consistent
10 with the evidence in this case for JD Edwards, and that's
11 what -- that's the point of both of our modifications, and
12 that's what we intend to argue if Your Honor -- unless Your
13 Honor rules otherwise.

14 Siebel's different. Siebel, number one, you
15 can't modify the software. So that's not an issue with
16 Siebel. It is locked down like Office, like Microsoft
17 Office or Word.

18 So we're not talking about modifying here. The
19 testimony has been that Rimini does use the Siebel
20 environments to test fixes. So if the software breaks,
21 they go to the one -- the copy that they have and they
22 test.

23 And that's fully consistent with the grants in
24 this particular license, which is the Novell license which
25 is Plaintiffs' Exhibit 705 at page 3, section 2.1,

1 subsection 4, talks about archiving emergency backup,
2 disaster recovery, and related testing.

3 So I would submit to Your Honor that the
4 evidence before the Court on Siebel is the use of testing
5 when the thing is broken, archival copy or even, in this
6 case, disaster recovery copy, to fix, to test the fix, is
7 consistent with this license grant.

8 And that's why that particular license supports
9 a license defense consistent with the evidence that's
10 presented in this case.

11 THE COURT: All right. Thank you, Mr. Reckers.

12 MR. ISAACSON: I believe what you're hearing on
13 JDE is that -- I don't understand the difference between
14 their definition of archive and any copy.

15 I mean, they're literally defining archive as a
16 copy for support, which is inconsistent with the Court's
17 interpretation of the JDE provision which limited it to the
18 purposes that we have described. The actual provision
19 would not make any sense if you interpreted it that way.

20 The Siebel license -- the Siebel agreement,
21 which is the Novell agreement, talks specifically -- it
22 specifically talks about emergency backup for disaster
23 recovery, and the Court has interpreted that provision.

24 And they're now advancing a factual case on
25 Siebel that is directly contrary to what they said on

1 summary judgment.

2 So at docket 474, page 24, when the Court ruled
3 on the Novell license, the Court interpreted the archival
4 emergency backup or disaster recovery purposes language and
5 said that, in footnote 20,

6 "Rimini has proffered evidence that the
7 development environments associated with Novell are used
8 exclusively for archival and backup purposes and related
9 testing," citing Brian Slepko, noting that Siebel
10 environments are not used for development.

11 That is no longer the case. All right. They
12 expressly talk about how they are used for testing, there's
13 actually evidence that they're used for development, and
14 that they're used for support of clients.

15 I don't actually think that they are presenting
16 a case that's consistent with what the Court's guidelines
17 for the case to be provided to the jury on this.

18 And clear guidance is going to be important so
19 I'm not leaping up during the closing argument and making
20 objections.

21 MR. RECKERS: Your Honor, I just have one quick
22 point, and that would be that you can't develop on Siebel.
23 Like I said, it's completely locked down. So it's just not
24 a thing. And so our arguments are fully consistent with
25 the Court's summary judgment ruling.

1 THE COURT: All right. I will take a look at
2 all of this.

3 All right. Have we exhausted what I started
4 with as argument one?

5 MR. ISAACSON: Yes, Your Honor.

6 THE COURT: Okay. Argument two concerns the
7 fair market value and instructions and damages.

8 So I think this is an Oracle argument. So I'll
9 hear from Oracle.

10 MR. RINGGENBERG: Thank you, Your Honor.

11 There's a great difference in the proof in this
12 case between Oracle Database on one hand and the other
13 three products, PeopleSoft, Siebel, and JDE on the other.

14 For Oracle Database, there's testimony about
15 Oracle's standard pricing for a license, and for Mr. Ravin
16 about what he would have agreed to if he had to buy a
17 license, and that evidence relates to the time period at
18 which infringement began.

19 So the jury has before it an adequate factual
20 basis to find a fair market value measure of damages for
21 Database. So we believe that ought to be presented to the
22 jury, and I don't think there's any disagreement between
23 the parties about that.

24 On the other hand, as to Siebel, JD Edwards, and
25 PeopleSoft, there is no factual basis for the jury to reach

1 a conclusion and calculate damages based on fair market
2 value as the Court's instructions provide, and there's two
3 reasons for that.

4 The first is this, was something Mr. Hampton was
5 going to testify to, and he disclaimed it on the stand. He
6 said expressly, "I did not calculate a hypothetical license
7 assessment for PeopleSoft, JDE, or Siebel.

8 "QUESTION: In your testimony, did you -- you
9 did a hypothetical license for Database. You did not do
10 one for PeopleSoft, JDE, or Siebel; correct?

11 "In my testimony, I think that's right."

12 That's what he said. That's at transcript 2846,
13 7 to 13.

14 So the jury doesn't have before it anyone who is
15 advocating what that measure should be. Mr. Hampton's
16 testimony is limited to what he called the benefit to
17 Rimini, but that's not what the fair market value asks.

18 And, as a legal matter, there's at least three
19 reasons why his testimony is not sufficient. It doesn't
20 address Oracle's side of the negotiation at all, it's not
21 based on the time period when the negotiation would have
22 occurred, and there's no benchmark, there's no comparable
23 that the jury would be allowed to reference.

24 So from our point of view, the jury should be
25 instructed to calculate database damages, and however the

1 jury picks between the two methods, that's fine, lost
2 profits or hypo license. But on PeopleSoft, JDE or,
3 Siebel, the only method that the jury has sufficient
4 evidence in front of it is on lost profits.

5 And if Your Honor -- Your Honor, if the jury
6 concludes we didn't have any lost profits, I guess we'll
7 get zero. We don't think that's going to happen, but
8 that's for the jury to decide. But they should not be
9 instructed on hypo license.

10 The one other point I'll add is Rimini's
11 proposed changes to the Court's jury instructions walk away
12 from the measure of damages that they asked the jury to
13 instruct on in the first place.

14 The new Rimini theory on these damages is that
15 hypo license is just one measure of value of use and that
16 there are others unspecified to the jury what they are or
17 how they should be calculated, which we think exemplifies
18 why the jury should not be invited to speculate as to what
19 this measure of damages should be.

20 I think we'll stop there. Thank you, Your
21 Honor.

22 THE COURT: All right.

23 Mr. Gorman?

24 MR. GORMAN: Thank you, Your Honor.

25 The Court's instructions on fair market value of

1 use on their face are absolutely correct. The fact that
2 Oracle did not present evidence of a hypothetical license
3 does not mean that Rimini does not get an instruction on
4 it.

5 Oracle's argument is largely a criticism of
6 Mr. Hampton's testimony. They're free to present this
7 criticism during their closing argument, but as this Court
8 held in denying Oracle's Daubert motion, Mr. Hampton's
9 testimony is relevant to the value of the hypothetical
10 license to Rimini.

11 Oracle is the plaintiff. It was their burden to
12 present evidence concerning the value of the hypothetical
13 license to Oracle. It's not Rimini's burden to demonstrate
14 the value of that license to Oracle.

15 For whatever reason, Oracle failed to present
16 this evidence. Instead of responding to Rimini's Daubert
17 motion, they withdrew Ms. Dean's testimony on hypothetical
18 license damages award, and the consequence of that decision
19 is that they have no evidence in this case on the value of
20 the hypothetical license to them.

21 As I stated before, Oracle's objection is
22 largely a criticism of Mr. Hampton's report, but looking at
23 the actual instructions that we're talking about here,
24 they're on their face entirely proper.

25 There's three instructions that this Court put

1 forward that concern fair market value of use.

2 The first is entitled Copyright Infringement
3 Damages - Introduction. That instruction correctly informs
4 the jury that it may award damages in the form of lost
5 profits or fair market value of use. There's no dispute
6 about that.

7 In fact, both Rimini Street and Oracle presented
8 fair market value of use theories during the trial. Rimini
9 Street presented a fair market value of use theory as to
10 all of the alleged infringement, and Oracle presented it
11 only as to the Oracle Database. Oracle also presented a
12 lost profits theory as to all the infringement.

13 So the jury will be faced with these two
14 measures of actual damages, and, as the Court's instruction
15 provides, it should be told that it may award either one.

16 The next instruction on fair market value comes
17 right after that introduction. It's entitled Copyright
18 Infringement - Actual Damages. It properly informs the
19 jury that there is no precise formula for determining
20 actual damages. This instruction is also proper.

21 Oracle argues that there are only two ways to
22 measure actual damages, lost profits or hypothetical
23 license. That is wrong. We cited many cases stating that
24 there are a variety of ways to demonstrate fair market
25 value of use.

1 We cite *Polar Bear* and *Dash v Mayweather* in our
2 jury instruction brief, and we've cited many other cases in
3 our prior briefing.

4 Most notably in *Wall Data*, the Ninth Circuit
5 stated,

6 "It is not improper for a jury to consider
7 either a hypothetical lost license fee, or the value of the
8 infringing use to the infringer."

9 Mr. Hampton testified about the value of the
10 infringing use to the infringer, and that's an entirely
11 appropriate measure of copyright actual damages.

12 *Polar Bear* reiterated this point, stating actual
13 damages can be measured by the value of use to the
14 copyrighted work to the infringer. We've cited that *Polar*
15 *Bear Productions* and *Wall Data* discussion several times,
16 and Oracle has not responded to it.

17 The third instruction is also proper, that is,
18 Copyright Damages - Fair Market Value. It explains how the
19 jury is supposed to determine a hypothetical license.

20 Oracle agrees that hypothetical licenses are at
21 issue in this case. They presented a hypothetical license
22 theory as to Oracle Database, and Rimini has presented a
23 hypothetical license theory as to all of the infringement.

24 As I stated before, it is not Rimini's burden to
25 put forth the value of the hypothetical license to Oracle.

1 That was Oracle's burden, and the fact that they failed to
2 do so does not mean that Rimini doesn't get an instruction
3 on that.

4 That's all for now, Your Honor. Thank you.

5 THE COURT: All right. Thank you.

6 Mr. Ringgenberg, do you want to respond to that?

7 MR. RINGGENBERG: Sure, Your Honor.

8 Two quick points. I think the answer to both of
9 the questions raised by Rimini's counsel is found in *Oracle*
10 *versus SAP*. I think we all have to agree that's the case
11 that has the most closely analogous facts. It's the same
12 software at issue, it's very similar conduct of
13 infringement, very similar testimony on damages.

14 In that case, both hypo license and lost profits
15 were presented to the jury. The district court judge after
16 trial, and the Ninth Circuit on appeal, found that the hypo
17 license evidence was lacking, insufficient as a matter of
18 law.

19 If Mr. Gorman's argument were accepted, it seems
20 that the outcome of that case should be, even though the
21 jury found that hypo license was a better measure, and it
22 supported zero dollars in damages, that Oracle should have
23 walked away with nothing in that case.

24 If Mr. Gorman's argument were correct, that
25 would have been the outcome, but that's not what the Ninth

1 Circuit said.

2 The Ninth Circuit accepted and did not reverse
3 that jury's finding that hypo license was a better measure,
4 but nonetheless increased the amount of damages awarded to
5 Oracle on a lost profits theory, \$327 million, because that
6 was the -- that was an adequate measure of actual damages.

7 The jury does not need to get instructed on a
8 theory of damages for which there is inadequate proof.
9 It's confusing, it's distracting, and it only raises issues
10 that we'll have to deal with after trial if the jury were
11 to somehow decide to apply that measure even though there's
12 a lack of adequate evidence before it.

13 The second point, which is whether or not the
14 value of use solely to the infringer is an adequate measure
15 of damages. SAP argues this point specifically and says
16 that the value of use as referred to in the Ninth Circuit
17 cases is the hypothetical license value. The statutory
18 term is actual damages.

19 The benefit to Rimini doesn't have any -- it may
20 be relevant to but is not determinative of Oracle's actual
21 damages. It's only actual damages if that's the fee that
22 Oracle is missing in this case because the parties would
23 have agreed.

24 For example, you know, if Oracle and Rimini had
25 agreed on \$100 million license fee, and they didn't get

1 that fee because it wasn't paid, Oracle's actual damages
2 are \$100 million. That would make sense.

3 But that's not what Mr. Hampton is doing and
4 that's not what Rimini wants the jury to do. All they want
5 to do is solely measure the value to Rimini, not the loss
6 to Oracle.

7 And so the citations to *Wall Data* or to *Polar*
8 *Bear* do not suggest the Ninth Circuit has ever upheld that
9 you can look solely to the benefit to the infringer. You
10 have to look at the loss to the copyright holder.

11 And on that point I would point the Court back
12 to the specific language in *Oracle versus SAP*, which says
13 normally the value of the hypo license is between the
14 benefit to the infringer and the cost of the licensee.

15 You have a negotiation. One side wants to pay
16 little, one side wants a lot. Normally they meet in the
17 middle. And that's why Mr. Hampton's calculation, which
18 only looks at Rimini's point of view, is missing half the
19 equation.

20 And -- thank you, Your Honor.

21 THE COURT: All right. Thank you. Okay.

22 MR. GORMAN: Just a quick response to that, Your
23 Honor.

24 THE COURT: All right.

25 Mr. Gorman?

1 MR. GORMAN: Mr. Hampton's calculation is the
2 amount that Rimini would pay as a rational economic actor,
3 and any price more than that Rimini would walk away from in
4 a hypothetical negotiation.

5 Oracle was free to put forth evidence of the
6 value of the hypothetical license to Oracle, but it chose
7 not to do so.

8 And just to point out in *Oracle v SAP*, Oracle
9 was the plaintiff as they are here, and the award that the
10 jury -- the jury's damages award was based on Oracle's
11 evidence that the Ninth Circuit and the District Court
12 found insufficient as a matter of law.

13 But the Ninth Circuit did not hold that the
14 plaintiff must demonstrate the value of the hypothetical
15 license to -- or that the defendant must demonstrate the
16 value of the hypothetical license to the plaintiff.

17 Thank you, Your Honor.

18 THE COURT: All right. Thank you.

19 All right. That will take us to argument number
20 3, lost profits causation.

21 MR. RINGGENBERG: I'm afraid I'm going to
22 overstay my welcome, Your Honor, so I'll be very brief.

23 There's two instructions on causation for lost
24 profits. There's one that Oracle proposed and one that
25 Rimini proposed, and they're both found in the Court's

1 proposed instructions.

2 And I think both parties agree we don't need
3 them both, and the question is which one makes more sense,
4 and on that I would say just point to the source.

5 Oracle's proposed instructions is taken from
6 CACI, the California standard jury instructions, on
7 causation in a tort case, because the Ninth Circuit has
8 held that causation in a copyright case is derived from
9 basic tort principles.

10 It outlines that substantial factor causation
11 and specifically says that if the losses would have
12 happened but for the infringing conduct, we don't get lost
13 profits. That's their argument. They're free to argue
14 that to the jury.

15 Rimini's instruction goes further and is a
16 one-sided, stilted statement of the law derived entirely
17 from their own making without a clear basis.

18 And while it could -- all except the last
19 paragraph, all except the last sentence, could be -- you
20 know, perhaps is an accurate, if one-sided, statement of
21 the law, the better approach is to take the model
22 instruction we have proposed.

23 I do want to talk, Your Honor, about the last
24 sentence in Rimini's proposed instruction which suggests to
25 the jury that we have to separately prove causation for

1 every single customer.

2 And it's true that we don't dispute that if the
3 jury were to conclude that some customers would have left
4 Oracle but for the infringement, that we can't get damages
5 on those. We don't dispute that, and the jury will sort
6 that out.

7 But what this instruction suggests is that
8 Oracle had to take a deposition of every single customer,
9 and absent that specific testimony from every single
10 customer, we can't fail to meet our burden of proof.

11 I'm predicting that their closing, if this
12 instruction is granted, is going to put this instruction on
13 the scene -- on the screen and tell the jury that Oracle
14 did not take the deposition of every one of 300 customers,
15 and therefore they haven't met their burden of proof.

16 And on that point I would like to point the
17 Court to something Rimini said in litigating this case. We
18 were litigating before Judge Leen the question of how many
19 depositions of customers we need to take. We wanted a lot,
20 they didn't want any.

21 And here's what they told Judge Leen.

22 "Oracle could depose two customers for each of
23 their relevant product lines. Any further customer
24 depositions would, by definition, be cumulative and
25 duplicative. Oracle does not need and should not be

1 allowed to seek the same information from multiple
2 third-party witnesses."

3 They continued,

4 "Oracle appears to be on a crusade to burden
5 every single one of Rimini's customers even though they all
6 have essentially the same information."

7 So for Rimini to claim to the jury that there's
8 a failure because we didn't take enough depositions after
9 arguing to Judge Leen that one or two would be enough
10 because they're all going to say the same thing, we think,
11 is reason enough to accept our proposed instruction.

12 Thank you.

13 THE COURT: All right.

14 Mr. Evanson?

15 MR. EVANSON: Your Honor, a few points in
16 response.

17 The first is that I think the best source for
18 this instruction is the Ninth Circuit's recent and very
19 definitive copyright damages case, it's the *Polar Bear* case
20 and *Oracle versus SAP*.

21 And if you read those cases, there is -- they
22 say over and over and over again that the danger in
23 copyright damages, and lost profits in particular, is
24 allowing a damages award that's based on speculation.

25 The risk of speculation is -- runs throughout

1 those cases, and the antidote for speculation in copyright
2 damages is this causal nexus requirement that both cases
3 stress so strongly.

4 So when we're talking about jury instructions, I
5 think the question has to be how do we guide the jury in a
6 way that its decision is not based on speculation.

7 And that's why we think this last sentence in
8 this instruction is so important, because our view is that
9 there is no way for the jury to come to a lost profits
10 damages award in this case other than looking at every
11 single customer, otherwise it will be based on speculation.

12 And Mr. Ringgenberg said, you know, the jury
13 will sort that out, and I don't know how they will, Your
14 Honor.

15 There's -- they had a copyright expert -- I'm
16 sorry, a causation expert, and you'll remember that he said
17 that without Rimini on the market, every customer would
18 have gone to Oracle because Oracle was the only one in the
19 market that provided vendor-level support.

20 So that's how they get from, if Rimini's not
21 infringing, or Rimini's not in the market, all the
22 customers go to Oracle.

23 But that's the link, that there's no -- there's
24 no evidence in the case that every customer wanted
25 vendor-level support. There's not common proof, there's

1 not individual proof.

2 There's no way for the jury to determine which
3 customers -- on a common basis, which customers needed or
4 wanted vendor-level support and, therefore, which of the
5 customers fall under this model.

6 So we submit, Your Honor, that unless the jury's
7 told that it has to look at every single customer, it will
8 necessarily engage in speculation.

9 I just wanted to highlight a few examples
10 because I think these examples disprove the model. Right?

11 We heard from AGCO and SonicWall, both customers
12 who were migrating to another software from Oracle. They
13 both wanted -- they didn't want Oracle upgrades, they
14 didn't want any of the vendor-level support, all they
15 wanted was a couple years of the gap measure. They wanted
16 to extend the Oracle software, and that's why they went to
17 Rimini.

18 Pitney Bowes was on self-support when they went
19 to Rimini. They didn't even come from Oracle.

20 And then you heard Mr. Baggett testify that he
21 had decided to leave Oracle before he even talked to
22 Rimini, that he was not going back to Oracle, and it was
23 based on reasons having nothing to do with the
24 infringement.

25 And all four of these customers are included in

1 the damages model. And I don't say that -- you know,
2 Mr. Ringgenberg mentioned, and, you know, it's been said
3 earlier in the case that we're free to -- Rimini Street is
4 free to pick up the customers that don't -- you know, that
5 are included and show how, you know, individual customers
6 weren't -- shouldn't be in the case, shouldn't be part of
7 the damages model.

8 But the burden is on the plaintiff to come -- to
9 put forth a model for the jury -- from which the jury can
10 determine without speculating which customers were lost as
11 a result of the infringement, and our position, Your Honor,
12 is that the only way to do that in this case is by looking
13 at every single customer, and that's why we think that
14 language in the instruction is accurate and important.

15 THE COURT: Okay. Thank you, Mr. Evanson.

16 The obvious question is how do you square that
17 proposition with the position Rimini took in front of Judge
18 Leen?

19 MR. EVANSON: Yes. Sorry, Your Honor. I should
20 have addressed that. So a few points.

21 First of all, I believe -- and Mr. Reckers will
22 correct me, but they subpoenaed every customer. It wasn't
23 just these 17. So they sent out subpoenas -- is that
24 right?

25 MR. RECKERS: Yeah, they sent out either

1 subpoenas or open record requests to every single customer
2 of Rimini Street for documents.

3 MR. EVANSON: So they asked for all this
4 information and sent it out to everybody.

5 And the point is not that -- the point is not
6 that every single customer has to be deposed, it's that
7 there has to be a model, there has to be a model for
8 getting from the acts of infringement or the misstatements
9 to a damages award, and that model does not exist based on
10 common proof in this case. And I think that's our
11 response.

12 MR. RINGGENBERG: Your Honor, I would only say
13 that if what they're saying is the testimony from Oracle's
14 witnesses isn't to be believed because it's inadequate or
15 lacks adequate foundation, that's a great closing argument
16 to make, but it doesn't have to do with instructing the
17 jury on something that's not an accurate statement of the
18 law.

19 THE COURT: Okay. All right.

20 A-4, the tort claim elements argument.

21 MR. RINGGENBERG: There's two issues, Your
22 Honor, with respect to these that we'd like to raise.

23 The first is whether -- is how the jury should
24 be instructed on the fraud claim, the fraud theory that
25 underlies both of these tort claims.

1 I think both the parties agree that the jury
2 needs to have some instruction that's specific that says
3 here's what that means, here's what you've got to prove to
4 prove up the tort claim underlying -- or the fraud
5 underlying these tort claims.

6 And, you know, Rimini proposed a paragraph in
7 their instructions on that point, and we think that's not
8 an accurate statement.

9 We have proposed two separate instructions which
10 we think ours are more accurate and fair and they're taken
11 from a common model that describes what a tort claim is.

12 And the principal difference between the two is
13 that Rimini's fraud instruction says the fraud has to be
14 aimed to induce damage in the third party, in the customer.
15 We think that's clearly wrong.

16 Our theory in this case is that Rimini and
17 Mr. Ravin lied to customers to harm Oracle, and that's
18 clearly a cognizable legal theory. If you lie to my
19 customers to get my customers to switch from me to you,
20 that's a fraud claim.

21 And so that's why their instruction -- which
22 specifically limits the damage to the third party, to the
23 customer, rather than to Oracle.

24 So I would point Your Honor to the last two
25 pages in your binder in Oracle's section which have our

1 proposed instructions which are based on common models for
2 what fraud requires.

3 And I don't really think there's anything more
4 to it than that.

5 The second point is whether, on tortious
6 interference, we can rely on the violation of the computer
7 statutes as a predicate.

8 We have proposed to the Court that our tortious
9 interference claim can be based either on fraud, or it can
10 be based on violation of these statutes which in some cases
11 are criminal in nature.

12 And we cited to the Court the *Restatement* which
13 says if something is independently unlawful, it can provide
14 a basis for tortious interference, the *Korea Supply* case
15 from California which says that expressly.

16 And then there's a Nevada case as well, which
17 I've now forgotten the name of, which provides that there's
18 a -- there is a tort claim under -- the underlying basis of
19 which was a violation of a realtor's duty under the statute
20 applicable to realtors.

21 So we think there's more than a clear basis to
22 include in the tortious interference claim those as
23 predicates as well.

24 And I would say I'm not clear on Rimini's
25 argument against that, what's the -- I'm not clear on what

1 the problem is from their point of view with including
2 those as predicates.

3 Obviously, they don't think they're proved, but
4 that's for the jury to decide.

5 Thank you, Your Honor.

6 THE COURT: Thank you, Mr. Ringgenberg.

7 MR. EVANSON: Your Honor, let me first just make
8 one point. I'm sorry I don't know the discovery record
9 better, but just to make clear that Oracle asked for 20
10 depositions, and Mr. Reckers made clear to me that they did
11 get all 20 depositions that they asked for.

12 So even though there was some pushback that
13 Mr. Ringgenberg mentioned, they did get all 20 depositions
14 that we heard from.

15 On the induced breach point -- well, first,
16 taking up Mr. Ringgenberg's first point, the two
17 instructions that they propose on misrepresentation, the
18 first on misrepresentation, the second on concealment, the
19 misrepresentation instruction omits nearly half of the
20 elements of the model instruction.

21 The model, the CACI 1900, requires knowledge of
22 falsity or reckless disregard of falsity by Rimini that
23 reliance by customers on Rimini's false statements be
24 reasonable, that the customers were harmed, that the
25 reliance was a substantial factor in causing the harm to

1 the customers.

2 So there are more elements to the instruction
3 than are in Oracle's proposed instruction.

4 Our counterproposal was just to make it into the
5 intentional tort instructions. We don't have a problem
6 breaking that out into another instruction.

7 But if that instruction's going to be given, it
8 needs to include all the elements of the misrepresentation
9 claim that plaintiffs are required to prove.

10 And on the concealment claim, I think this is
11 the first time that we've heard concealment as a separate
12 basis for fraud, and I don't think it was pleaded, and we
13 haven't heard it before.

14 And Oracle's proposed instruction on
15 misrepresentation by concealment also omits several of the
16 elements. There has to be an intent to deceive, an actual
17 reliance, harm to the third party, a causal nexus between
18 the concealment and the harm.

19 So all of these elements need to be in the
20 instruction. Again, if we're going to break it out into a
21 separate instruction, those all need to be in there.

22 And then the second point Mr. Ringgenberg
23 mentioned on adding computer hacking claims as predicate
24 acts for the intentional interference claim, there are some
25 serious or real problems with this, Your Honor.

1 The first is that the computer hacking claims
2 are very messy, and I'm sure Your Honor has read the *Nosal*
3 case that we cited in the our briefs, and all the
4 constitutional concerns raised there applying a computer
5 hacking statute to a claim that a person violated the terms
6 of use of a website.

7 And all those constitutional terms in the *Nosal*
8 case are heightened immeasurably if it is not only a
9 standalone claim, but a way for expanding it into an
10 interference claim. We think that's taking a
11 constitutionally suspect statute and putting a magnifying
12 glass on it.

13 And because -- and the other problem, Your
14 Honor, is that because we don't think these claims will
15 survive, even if the jury comes back and finds Rimini
16 liable on them, because we don't think that they'll survive
17 a Rule 50(b), it would create real problems sending them to
18 the jury intertwined with the interference claims.

19 Because I -- you know, I understand Your Honor's
20 position you want to deal with the 50(a) motions on the
21 back end, and we respect that, but it will be difficult to
22 carve out the hacking claims from the interference claims
23 if they're intertwined with the interference claims along
24 with other predicate acts.

25 And so our position -- you know, we obviously

1 argue in Rule 50 that the computer hacking claims should
2 not go to the jury, but we think it's especially important
3 they don't go to the jury as predicates for interference
4 claims because that will make a real mess of it.

5 THE COURT: Okay. I understand your argument.

6 MR. RINGGENBERG: Two quick points, Your Honor,
7 please.

8 THE COURT: Mr. Ringgenberg?

9 MR. RINGGENBERG: Thank you.

10 So the case that I was trying to remember
11 before, but I couldn't, from this great state is *Davis v*
12 *Beling* which relied on the statutory duty of a realtor to
13 -- as a basis for a tort claim which is cited in our
14 papers.

15 On our proposed instruction about what's an
16 actual misrepresentation, I disagree with counsel that
17 reliance isn't stated. For example, the element three is
18 it did cause reliance.

19 If it's not clear enough to the Court that the
20 instruction is limited to knowingly false representations,
21 we would have no objection to adding the word "knowingly
22 false" to the instruction, but we think it's clear enough
23 as it stands given there's intentionality required.

24 And with regard to the constitutional concerns,
25 either we've pled the claim or we haven't, and if -- either

1 we've stated the claim or we haven't, the constitutional
2 concerns go to what the law is, that's not for the jury to
3 sort out.

4 If this theory is going to be presented to the
5 theory -- to the jury on -- as a standalone claim, there's
6 no reason why we can't also include it in this. It's
7 either fish or fowl, Your Honor, one way or the other.
8 Thank you.

9 THE COURT: All right. Thank you,
10 Mr. Ringgenberg.

11 Okay. Let's go to A-5, the computer access
12 issue. Mr. Evanson.

13 MR. EVANSON: There's really one point, Your
14 Honor, that we want to discuss on the computer access
15 claims, and that's the definition of without authorization.

16 Our argument is pretty straightforward. The
17 Ninth Circuit interpreted this language in the *Nosal* case
18 and held that a defendant does not act without -- does not
19 act without authorization if it uses a third party's
20 credentials, a third party who has access, who has proper
21 access to the system, to access the system. That is not
22 acting without authorization.

23 And that was a square and clear holding in the
24 *Nosal* case, and we think it applies squarely to the facts
25 of this case because it's undisputed that every time Rimini

1 accessed Oracle's database -- or Oracle's website, it was
2 doing so with credentials it was provided by Oracle's
3 clients.

4 And so we're just asking that that definition of
5 "with authorization" be put into the instructions because
6 it was -- it's sort of so clearly a holding of the *Nosal*
7 case.

8 THE COURT: Okay. All right. Thank you very
9 much.

10 Mr. Hixson?

11 MR. HIXSON: Your Honor, with respect to the
12 definitions for the computer access ones, these were
13 jointly proposed, and so I'm now in the odd position of
14 defending something that Rimini has previously agreed to it
15 is now backing away from.

16 With respect to the "without authorization,"
17 there isn't a definition within the statute itself about
18 what that term means.

19 And so what the parties originally did in coming
20 up with that defined term was to turn to the Ninth
21 Circuit's decision in *LVRC Holdings v Brekka*, the 2009
22 opinion, and to take the language that the Ninth Circuit
23 used to describe the term "without authorization."

24 They described it as a person who accesses a
25 computer without authorization, accesses a computer without

1 any permission at all.

2 That was the language from the Court's opinion,
3 and that was what the parties in the original joint
4 proposal had submitted. And we think that is a concise
5 explanation that captures the meaning of that term, which
6 is not otherwise defined in the statute.

7 Rimini's additions are -- string a couple of
8 different sentences together, but there's no one place or
9 one case that you could look for that.

10 They argue that *Nosal* concerned the issue of
11 authorization by a third party, but Rimini's proposed
12 instruction doesn't quote exact language from the *Nosal*
13 opinion, it's a construct.

14 We also think that the existing definition which
15 says, "without authorization means without any permission
16 at all," fairly embraces the question of whether a third
17 party granted access. Obviously, if they didn't, then
18 there isn't any permission at all.

19 And so we think that the Court should stick with
20 the previously-agreed instruction as quoted from the Ninth
21 Circuit's decision.

22 Another problem we have with Rimini's new
23 proposed definition is that it introduces the word hacker.
24 They want to say that someone accessed without
25 authorization -- if they don't have any authorization for

1 any purpose such as when a hacker accesses someone's
2 computer without any permission.

3 We think the word hacker is problematic for a
4 number of reasons. First, as the Ninth Circuit explained
5 in the *Nosal* decision, hacker is a colloquialism that
6 refers to a person who accesses without authorization or in
7 excess of authorization.

8 The Court's existing instructions explain those
9 legal terms to the members of the jury. Introducing the
10 colloquialism hacker, without an explanation of what that
11 means, puts an undefined term in front of the jury and
12 doesn't tell them that they don't need to think about it
13 because the Court's other instructions already capture the
14 essence of the CFAA violation.

15 I would also note that the Court issued an order
16 in limine preventing Oracle from using pejorative terms to
17 describe Rimini during the trial. The three specific ones
18 were pirate, thief and the word steal.

19 I acknowledged that the word hacker wasn't among
20 them, but it seemed strange after the Court issued that
21 order to then put in the jury instruction a pejorative term
22 that doesn't appear in the statute that's really a
23 colloquialism for terms that are in the statute, and that
24 threatens to introduce more confusion to the jury than any
25 benefit.

1 Thank you.

2 THE COURT: Mr. Evanson?

3 MR. EVANSON: A few quick points, Your Honor.

4 We heard testimony of Mr. -- I forget his name,
5 the Oracle architect, there's been too many witnesses, I'm
6 sorry -- all about hacking.

7 And it's important -- I mean, you read the *Nosal*
8 opinion, Your Honor, and the core holding of the en banc
9 Ninth Circuit is that these statutes are limited to
10 hacking.

11 They are not -- they cannot constitutionally be
12 applied to violating the website's terms of use, and we
13 think, you know, the added language construction is just
14 meant to communicate that caution from the en banc Ninth
15 Circuit to the finder of fact that these are not to be
16 broadly read to encompass any time you access a computer in
17 a way the computer owner doesn't like.

18 Finally, one point I forgot to mention, *Nosal*
19 was obviously only dealing with the federal statute, but
20 every one of these statutes that Oracle is asserting have
21 the same "without authorization" limit in it. So it's
22 without authorization or without permission.

23 And because what motivated *Nosal* was the
24 constitutional concerns, with reading it more broadly, we
25 think the holding applies just the same to the California

1 and Nevada statutes.

2 Thank you.

3 THE COURT: Thank you.

4 MR. HIXSON: Two points, Your Honor.

5 First, to respond briefly on hacking, it remains
6 the case, and counsel for Rimini did not dispute, that the
7 word hacking is a colloquialism, and the Ninth Circuit did
8 explain that it's a shorthand for accessing without
9 authorization or in excess of authorization.

10 The Court's existing instructions explain those
11 elements of these causes of action to the jury, but
12 introducing a pejorative term hacking that is not defined,
13 and without explaining to the jury that that really just
14 means what you've already told them in the other
15 instructions is confusing and unhelpful.

16 And, second, to counsel's other point where he
17 states that the state claims, the California Penal Code and
18 the Nevada statute, he argues that their definition of
19 without authorization should be imported into those as
20 well.

21 We disagree with that based on the Ninth
22 Circuit's recent decision in *United States v Christiansen*
23 where the Ninth Circuit said that the California Penal Code
24 is not similar to the CFAA. And specifically with regard
25 to access and authorization, the Ninth Circuit said the two

1 statutes were quite different.

2 With respect to the CFAA, the Court confirmed
3 that that's principally an access statute, but with respect
4 to the California statute, the Ninth Circuit said that the
5 focus of that is not on access but on taking, what somebody
6 does, what they obtain, what they get from the website.

7 And so Rimini's proposed definition of without
8 authorization focuses on access which is a CFAA concern,
9 but the different language in the California and the Nevada
10 statutes is focused more on taking the materials on the
11 website.

12 And so importing that definition into those
13 other statutes wouldn't make sense and would contravene the
14 Ninth Circuit's recent recognition that the California
15 statute is different materially from the federal one.

16 THE COURT: All right. Thank you, Mr. Hixson.

17 Okay. We're up to A-6 concerning punitive
18 damages instructions.

19 MR. EVANSON: Your Honor, our objections to
20 punitive damages instructions is not to the instruction
21 that Your Honor has proposed, it's to the additional
22 instructions that Rimini Street proposed that were not
23 included in the Court's set.

24 And we're not sure whether the concern relates
25 to the merits or with -- or whether they're appropriate in

1 this first phase of trial, and so I'm addressing the second
2 point first, Your Honor.

3 The -- this often comes up in punitive damages
4 cases, that there's a question of whether -- how many
5 instructions go in the second phase if punitive damages is
6 found to be available, and how many go in the first phase.

7 And the *Philip Morris versus Williams* case made
8 clear that the limits that the Supreme Court has imposed on
9 punitive damages are not just limits that can be imposed
10 through the Court's de novo review of the amount of the
11 award post-trial or post-judgment, they also are
12 necessarily -- or they are -- the protections also must
13 necessarily come in the form of jury instructions that help
14 ensure that the jury does not impose a punitive damages
15 award unlawfully and unconstitutionally.

16 That was the square holdings of the *Philip*
17 *Morris* case which reversed for a new trial when a
18 defendants' instruction was denied that the Supreme Court
19 found was important to protect against the risk of
20 unconstitutional punishment.

21 So it's clear that jury instructions directed to
22 important limits on the scope of punitive damages must be
23 given. *Philip Morris* uses that word "must."

24 And the second point, Your Honor, is I want to
25 direct the Court to the *Holdgrafer* case that we've cited in

1 our papers. That's a California Court of Appeal case where
2 the trial court gave the -- it was an instruction similar
3 to in *Philip Morris versus Williams*.

4 The Court gave that instruction at the end of
5 phase two, but had not given it at the end of phase one
6 when the jury was faced with the decision whether to impose
7 punitive damages liability at all.

8 And the Court of Appeal reversed because those
9 instructions are necessary not only to cabining the amount
10 of punitive damages that the jury imposes, but cabining the
11 jury's imposition of punitive damages at all.

12 And there are lots of reasons for this, Your
13 Honor, and I'll mention one, and it's the one that Justice
14 O'Connor identified in the *Haslip* case that there is a
15 stigma that attaches to a company that is -- that is hit
16 with a punitive damages award, regardless of the amount and
17 regardless of whether it can ultimately be fixed in
18 post-trial motions on appeal through the Court's de novo
19 review.

20 So we think it's very important that the
21 limit -- that the jury be instructed on the limits that
22 exist as to the availability of punitive damages, not just
23 to the amount in phase two.

24 Thank you.

25 THE COURT: All right. Thank you.

1 MR. HIXSON: Your Honor, Oracle objects to the
2 inappropriate piling on of multiple and redundant
3 instructions concerning punitive damages.

4 This Court has confirmed in a prior ruling that
5 Nevada law will be used to determine the ability to assess
6 punitive damages.

7 And so, in that light, Oracle took the Nevada
8 model instruction, number 12-PD.1 and provided and adapted
9 that model as P-46, the punitive damages instruction, which
10 is the Court's tentative instruction.

11 This adequately covers the entitlement of
12 punitive damages and provides adequate protection to Rimini
13 Street.

14 Rimini's proposed -- their five additionally
15 proposed instructions are either entirely duplicative of
16 the existing one or have no basis at all.

17 For example, their proposed D-42 about the
18 purpose of punitive damages is already covered by the
19 existing instruction which states the purpose.

20 Their D-44, which concerns specific harm to the
21 plaintiff, is already addressed by the existing instruction
22 which directs the jury to consider the harm to Oracle.

23 Their D-45 is again addressed by the existing
24 instruction which discusses the standards for applying
25 punitive damages.

1 Their D-46, concerning industry standards, is
2 irrelevant as Rimini elected not to put on evidence of
3 industry standards at trial.

4 And their D-47, fair notice concerning a change
5 of law, is baseless as there is no relevant change of law
6 here.

7 But beyond that, the cumulative effect of all
8 these instructions would mislead the jury. For example,
9 Rimini's proposed instructions 45, 46, and 47, begin with
10 the words, "even if you find that punitive damages might be
11 available," and then they go on to put another condition
12 that the jury shouldn't award that punitive damages.

13 What that would mean is that there would be one
14 instruction following the model that says you look at
15 oppressive malice, you look at all the relevant standards,
16 and then, if the jury finds that, then they would be
17 confronted by a further instruction that says even if you
18 found that Rimini's conduct satisfied these standards,
19 there's another box to check, and then after that another
20 one, even if you find that.

21 It's like a six-part checklist where the jury
22 has to go through every last hurdle before they can assess
23 punitive damages, and that's not the law.

24 The first instruction, which is adapted from the
25 Nevada model, that's the law. That's the checklist the

1 jury has to apply. There aren't other ones in addition to
2 that, and that's the way that Rimini's instructions are
3 phrased.

4 I'm reminded of a quote that we cited in our
5 brief, Your Honor, from a practice group guide that says,
6 "jury instructions should provide the relevant rules of law
7 generally and avoid singling out or stressing particular
8 evidentiary items or legal theories, otherwise the court's
9 emphasis of certain facts or issues may cause a juror to
10 attach undue importance or credibility to the selected
11 matters."

12 That's what Rimini is trying to do here by
13 having more instructions about punitive damages than about
14 licenses, which are the heart of this copyright
15 infringement case.

16 The existing model that we've provided and the
17 Court has in its tentative instruction is appropriate, it's
18 adapted from the Nevada model, and it accurately captures
19 the law that the jury is to apply in punitive damages.

20 Rimini's suggestion there should be additional
21 boxes to check is contrary to the law and would mislead and
22 confuse the jury.

23 THE COURT: Thank you, Mr. Hixson.

24 Mr. Evanson?

25 MR. EVANSON: Just a few points, Your Honor.

1 The model instructions are great for most -- in
2 most instances. In punitive damages, the model
3 instructions are not sufficient. And that's what happened
4 in *Williams*, that's what happened in *Holdgrafer*.

5 Many courts have held and reversed where -- or
6 ordered new trials on post-trial motions because punitive
7 damages pose such an acute risk of the arbitrary
8 deprivation of private property.

9 That's the Supreme Court's language, and in a
10 series of decisions the Supreme Court has stressed the
11 importance of this, culminating in *Williams*, which required
12 that the jury be instructed, when there is a substantive
13 constitutional limit, on the extent -- on the punitive
14 damages that can be awarded.

15 And so it's -- the model instructions are not
16 sufficient, Your Honor. And if the -- if the issue is
17 there are too many instruction, you know, there were
18 three -- there was an instruction on objectively reasonable
19 conduct, industry custom and practice, and fair notice.
20 Those could be combined into one.

21 But our concern is the jury has to be told that
22 these are not permissible bases for punitive damages.

23 And a few -- you know, Mr. Hixson mentioned that
24 there's no fair notice issue. This case involves alleged
25 infringement, willful infringement, and malicious conduct

1 based on misstatements that were made, infringement that
2 occurred, that three, five years later was deemed to be
3 infringement.

4 So all the conduct in this case preceded the
5 Court's ruling on infringement by three years.

6 The jury has to know that unless we had reason
7 to believe that the Court was going to rule in 2014 that
8 there was infringement, statements in 2009, 2010, about the
9 interpretation of the licenses are not a permissible basis
10 for imposing punishment if there was no fair notice.

11 That is a central limit on the application of
12 punitive damages in this case.

13 One other -- one other point, Your Honor. We
14 propose making clear to the jury in the instruction that
15 punitive damages are not available for copyright
16 infringement.

17 We think that's important because this case is
18 mostly about copyright infringement, and punitive damages,
19 obviously, there's no dispute, can't be based on
20 infringement alone, and so just specifying that for the
21 jury we think is important.

22 Thank you.

23 THE COURT: Thank you.

24 MR. HIXSON: Your Honor, a few brief points.

25 Counsel for Rimini has argued that there was not

1 fair notice because their conduct occurred before the Court
2 had occasion to issue summary judgment rulings.

3 I would submit that's true in all lawsuits where
4 conduct occurs, then there's a lawsuit, and then there are
5 rulings. That doesn't mean that the defendant was not on
6 fair notice.

7 Our interference claim, in addition to relying
8 on the computer statutes, relies on fraud. And lies are
9 always wrong, and if the jury concludes that Rimini was
10 lying, they -- Rimini didn't need further notice than
11 simply to know that it's wrong to lie to people.

12 With respect to the model instruction, counsel
13 for Rimini has argued that in some cases the models aren't
14 appropriate.

15 What Rimini hasn't done, either in its briefing
16 or today in argument, is to say what's missing or wrong
17 with the model.

18 The model carefully goes through and explains
19 the standards of malice and oppression and despicable
20 conduct and fraud. It's strong language. It provides
21 strong guidance to the jury about the factors they are to
22 consider.

23 So there's no substantive problem with the model
24 instruction that Rimini has identified.

25 As to their last point about clarifying that

1 punitive damages are not available for copyright
2 infringement, we're fine with that modification. That is
3 true, they're not available for copyright infringement.
4 And we're seeking them on our other claims.

5 But beyond that, Rimini's proposed piling on of
6 additional instructions is unwarranted when the model
7 accurately captures the governing legal standard, and
8 adding additional instructions would wrongly suggest to the
9 jury that after they've applied the governing standard,
10 there are other boxes they also have to check beyond that
11 when that's not actually the case.

12 THE COURT: All right.

13 Mr. Evanson, one last point.

14 MR. EVANSON: One last point, Your Honor, I
15 apologize.

16 The lie alleged in this case, the principal lie
17 alleged in this case is saying that we didn't infringe,
18 right, that we were telling customers before 2011 that we
19 didn't infringe.

20 The infringement -- the Court's ruling on
21 infringement didn't occur for five years later, and so that
22 is only a false statement when viewed in hindsight. And I
23 think the jury needs to be told that if we didn't have fair
24 notice in 2009 that a judge -- or a court five years later
25 was going to deem our conduct infringing, then that cannot

1 be a basis for punitive damages, Your Honor.

2 That's all. Thank you.

3 THE COURT: All right. Thank you.

4 Okay. That takes us to our last -- oh, no.

5 Yeah, A-7 is the last of the issues for argument, and that

6 concerns an instruction including reference to

7 CedarCrestone and TomorrowNow.

8 MR. RINGGENBERG: Thank you, Your Honor.

9 During the first two years or so of Rimini's
10 operation, TomorrowNow was Rimini's primary competitor
11 other than Oracle. It's the only competitor Rimini had
12 with a substantial customer base.

13 Rimini has made a centerpiece of its damages and
14 causation argument. The question, once customers leave
15 Oracle, where are they going, citing opening statement,
16 page 120, line 19 to 21.

17 As the record stands, the jury doesn't know that
18 TomorrowNow was an infringer. The jury does know that some
19 customers left Oracle for TomorrowNow.

20 And as far as the record and the instructions as
21 currently composed would allow, the jury may well conclude
22 that but for Rimini's infringement, some customers would
23 have left Oracle and gone to TomorrowNow instead, and
24 therefore we don't get damages on them. And if the jury
25 were to reach that conclusion, it would be contrary to law.

1 The Court knows that Rimini was an infringer
2 because they pled guilty to criminal copyright
3 infringement, and they stipulated to civil liability for
4 the exact same conduct at issue in this case, at least very
5 similar conduct.

6 That's been kept from the jury for reasons we
7 respect. We understand the Court's ruling on that, and
8 we're not asking to revisit that.

9 But in light of that circumstance where there's
10 an admitted infringer who took some of Oracle's customers,
11 and Rimini is raising the question of where would the
12 customers have gone but for Rimini Street and their
13 infringement, the jury needs to be told that they cannot
14 count against Oracle any customers that might have gone to
15 TomorrowNow instead of Rimini Street.

16 It's settled on the patent context, and I think
17 not disputed here, that if you would have lost a customer
18 to a different infringer, that doesn't count against you on
19 lost profits. And we cite a number of cases on that point.
20 I don't think Rimini really disagrees with that.

21 So that's the thrust of the argument, Your
22 Honor.

23 I would add that Rimini told the Court
24 repeatedly that they would not claim TomorrowNow was a
25 noninfringing alternative. And I haven't heard them say

1 that expressly, but what they have said is 5 percent of
2 Oracle's customers leave every year; where are they going?

3 Well, the reality is a goodly number of the ones
4 at issue went to TomorrowNow in this case, at least in the
5 early period. And to allow the jury to infer that,
6 therefore, Oracle should have reduced damages would be
7 inappropriate.

8 One last point, which is one of the things that
9 we expect to see in closing, is Rimini's argument that
10 after Rimini came on the scene fewer customers left Oracle
11 than in the period before.

12 One of the reasons that's true is because the
13 period right before Rimini came on the scene, TomorrowNow
14 was illegally taking numerous Oracle customers, and that
15 conduct stopped after we sued them.

16 And so that's another instance of they haven't
17 said expressly that TomorrowNow was an infringer, but
18 they're putting before the jury facts on which really
19 that's the basis.

20 And so we would ask the Court to instruct the
21 jury, without talking about TomorrowNow as an infringer,
22 saying anything about only that, if you conclude that some
23 customers would have left for TomorrowNow, you shouldn't
24 take those into account as contrary to Oracle's damages.

25 And ultimately the same issue applies to

1 CedarCrestone. I'll concede that it's a less significant
2 issue because CedarCrestone was a less significant
3 competitor. But ultimately the issue is exactly the same.

4 Thank you, Your Honor.

5 THE COURT: All right. Thank you,
6 Mr. Ringgenberg.

7 Mr. Gorman?

8 MR. GORMAN: Thank you, Your Honor.

9 Most of this instruction is unnecessary filler.
10 The first five sentences simply restate the parties'
11 arguments as Oracle would describe them, but they don't
12 contain any instruction on the law.

13 The final sentence, which is the only sentence
14 that Oracle actually defends in its brief, is entirely
15 improper.

16 It states that,

17 "The jury must not consider TomorrowNow and
18 CedarCrestone as available third-party supporters that
19 customers might have chosen instead of Rimini Street."

20 Oracle's brief contains no explanation or
21 definition of the word available, and neither does the jury
22 instruction that they've proposed.

23 I think what Oracle really means is that
24 TomorrowNow and CedarCrestone are not noninfringing
25 alternatives.

1 The patent cases that Oracle cites clearly state
2 that whether a competitor is a noninfringing alternative is
3 a question of fact, and they also state that the burden is
4 on the plaintiff to demonstrate the absence of
5 noninfringing alternatives.

6 Oracle has not met its burden in this case.

7 The arguments that were just made were based on
8 evidence that has not been presented in this case.

9 In Oracle's brief, they cite to evidence that
10 they say is before this Court that supports the
11 instruction, but they only cite sidebar conversations with
12 the judge.

13 They cite PTX 1483, 1489, 1487. Those were not
14 admitted at trial. They cite the Fees' declaration, that
15 was also not admitted at trial.

16 Oracle's experts testified that they were
17 instructed by their attorneys to assume that TomorrowNow
18 and CedarCrestone were infringing alternatives, but they
19 didn't form an opinion on that. In fact, Oracle's counsel
20 informed the Court that the experts would not testify that
21 they formed an opinion on that.

22 It is not true that the Court could determine as
23 a matter of law that TomorrowNow and CedarCrestone were
24 infringing during the entire time at issue in this lawsuit
25 based on the evidence that Oracle's presented.

1 The fact that TomorrowNow or CedarCrestone may
2 have stipulated to wrongful acts, or even infringement at a
3 certain place in time, does not mean that they were
4 infringing during the entire time period at issue in this
5 lawsuit, and for the judge to instruct the jury on that
6 would be to act as a fact finder based on evidence that is
7 not before the jury and not before the Court.

8 MR. RINGGENBERG: Two points, Your Honor.

9 First, the argument I just heard is exactly the
10 arguments they told the Court they wouldn't make, which is
11 that CedarCrestone and TomorrowNow are noninfringing
12 alternatives and we haven't proved otherwise.

13 I'd cite the Court to docket 816, the brief by
14 Rimini at 2, where they represented to the Court they
15 wouldn't do that.

16 And the second point is it's true the jury has
17 not heard that TomorrowNow is infringing. The jury didn't
18 learn that there's a criminal guilty plea, a criminal
19 guilty plea, for copyright infringement because they asked
20 the Court to exclude that evidence because it's prejudicial
21 to them. And, fair enough, Your Honor, we respect the
22 Court's ruling on that.

23 But it's unfair to prevent us from introducing
24 the evidence as a fact and then claim we haven't met our
25 burden of proof on that issue.

1 The right answer is to instruct the jury
2 neutrally that you shouldn't consider TomorrowNow as an
3 alternative for causation purposes and leave it at that.
4 And we think that's entirely fair and what the law requires
5 given that we've been prevented from introducing the
6 evidence that would show they are infringing for reasons we
7 respect, Your Honor.

8 Thank you.

9 THE COURT: All right. I think we've covered
10 all the issues that are present before the Court, and we've
11 had argument on the ones that are considered to be the most
12 significant.

13 Let's see. It's quarter after 11:00. It's
14 going to take the Court some time, obviously, to get
15 through these.

16 I'm estimating that sometime between 2:00 and
17 3:00, more likely toward 3:00, we'll be able to give you
18 the proposed final set by the Court which would address
19 these remaining instructions that -- to which there has
20 been objection raised, whether it's been submitted on the
21 pleadings or whether it's been argued.

22 Whenever I do get them to you, I'll schedule a
23 hearing, probably a half hour to 45 minutes later, just for
24 a final review of what's being instructed.

25 But I would tell you that I will take your

1 arguments -- I don't want to hear new argument on
2 anything -- excuse me, I don't want to hear the same
3 arguments again on anything at all.

4 If someone sees something that's entirely new,
5 entirely unrelated to the arguments that have been raised
6 to the Court already, or if you spot a mistake, something
7 that's internally inconsistent or something that conflicts
8 with another instruction, I'll certainly hear that. But I
9 don't want to have reargument in any way.

10 And because of the shortness of the hour, the
11 Court's obviously not in a position to give you reasoned
12 decisions for what is finally selected beyond saying that I
13 will have obviously adopted in considerable part the
14 arguments raised by whichever party is successful on the
15 final instruction.

16 And if I have also considered something else
17 that I think is significant, I will tell you, but I don't
18 think that's going to happen.

19 So I think you're on standby mode. But I
20 won't -- I won't have anything to you until 2:00 at the
21 earliest.

22 MR. STRAND: Your Honor, there is one
23 outstanding motion or issue regarding some documents,
24 exhibits that people tried to get in through depositions
25 last week.

1 I was asked to bring that --

2 THE COURT: Yes, I know. What is that, 260 or
3 DTX --

4 MR. STRAND: Yes.

5 COURTROOM ADMINISTRATOR: Can I go through those
6 first and then provide a list that everybody agrees on?

7 THE COURT: Yeah. Maybe for the benefit of our
8 records, let's --

9 COURTROOM ADMINISTRATOR: If that's okay with
10 you.

11 THE COURT: But you don't need to take my time
12 to do it right now.

13 MR. STRAND: Right.

14 THE COURT: If you can just let Dionna know
15 everything that you feel has not been ruled on.

16 I know that one is out there, and to respond to
17 that -- we're just about ready with it.

18 There will -- and I don't think it's going to
19 affect anyone's arguments. There will be some -- I can
20 tell you already from -- I've gone through it thoroughly
21 once, and I know that there will be some significant
22 redactions.

23 MR. STRAND: Okay.

24 THE COURT: I can't tell you how many. And
25 obviously there will be some that stays in.

1 So we'll get those to you tonight by 5:00.

2 MR. STRAND: That's fine, Your Honor --

3 THE COURT: I know it's there. I don't think it
4 would affect argument.

5 MR. STRAND: Okay. Thank you, Your Honor.

6 THE COURT: And please let Dionna know on
7 anything that you think is still out there for ruling by
8 the Court on admissibility.

9 MR. RINGGENBERG: Your Honor, at 2:00 do you
10 expect to provide a verdict form as well?

11 THE COURT: Oh, yeah. Yeah. And we may -- I
12 may be able to provide you with the verdict form earlier
13 rather than later. So you may get -- you may get that
14 earlier.

15 I'd like you to see it before we -- if it's
16 ready before we finish the rest of this.

17 All right. Thank you.

18 COURTROOM ADMINISTRATOR: Please rise.

19 (Recess from 11:20 a.m. until 3:49 p.m.)

20 (Outside the presence of the jury.)

21 COURTROOM ADMINISTRATOR: Please rise.

22 THE COURT: Have a seat, please.

23 The record will show we're in open court with
24 counsel. The jury is not present.

25 I would guess a little over a half an hour ago

1 the Court had distributed the proposed final draft of jury
2 instructions.

3 I considered all of the arguments raised. I
4 think the instructions in this final package reflect my
5 rulings based generally upon what was being argued by the
6 party who would have been opposing or favoring as the case
7 may be.

8 Is there any particular question specifically to
9 any of the instructions, or are there any errors that you
10 think need to be addressed?

11 MR. EVANSON: We have a couple, Your Honor.

12 On the two tort claims, the --

13 THE COURT: What pages are you on?

14 MR. EVANSON: I'm on 79 and 82. This is the
15 inducing breach and the intentional interference claims,
16 the elements.

17 THE COURT: I'm on page 79. That's return of
18 verdict.

19 I'm referring to the Court's page numbers at the
20 bottoms of the instruction package I passed out to you.

21 MR. EVANSON: We don't have Word Perfect, so we
22 converted it to Word, and it may have changed the Word
23 numbering.

24 THE COURT: Okay.

25 MR. EVANSON: So it's inducing breach and

1 intentional interference.

2 THE COURT: All right. Inducing breach. Go
3 ahead.

4 MR. EVANSON: So in both of these the Court has
5 laid out the elements of the misrepresentations claim --

6 THE COURT: Yes.

7 MR. EVANSON: -- which, you know, both parties
8 requested, and the one note was that there was the --
9 reliance element of that misrepresentation claim was not
10 included. And I think both parties included reliance as an
11 element in what we proposed to the Court.

12 So I don't know if that was an oversight or not,
13 but we just wanted to raise the inclusion of -- it says
14 that Rimini Street must have intended to induce the third
15 party to rely on that statement, but we think that actual
16 reliance is also --

17 THE COURT: Let me see if I could find it in my
18 notes. Was this one of the A-1 through A-7 arguments?

19 MR. EVANSON: It would have been -- I don't want
20 to guess. I want to say it would have been A-4.

21 THE COURT: Okay. I've got it.

22 MR. EVANSON: It would have been A-4.

23 THE COURT: All right.

24 MR. EVANSON: And I don't think -- when we
25 argued this morning, I don't think we spoke -- we discussed

1 the reliance element specifically because both parties had
2 agreed that that was one of the elements of the
3 misrepresentation claim. That was in both of our
4 submissions from Saturday.

5 THE COURT: Do plaintiffs agree with that?

6 MR. RINGGENBERG: We do, Your Honor. Well, we
7 don't object to the addition of a specific reliance --

8 THE COURT: So the specific change would be what
9 again?

10 MR. EVANSON: So we would propose adding to the
11 end of the sentence --

12 THE COURT: Which sentence?

13 MR. EVANSON: The sentence that says,

14 "To satisfy this element, a misrepresentation
15 must be communicated to the customer, it must be a false
16 representation at the time it was made, it must be made
17 with knowledge or belief that it is false, and Rimini
18 Street must have intended to induce the third party to rely
19 on that statement."

20 We would add to the end of that, "and the third
21 party must have, in fact, relied on that statement."

22 THE COURT: Well, strike the "and" after
23 "false."

24 "Rimini must have intended to induce a third
25 party to rely on that statement, and the third party must

1 have, in fact, relied on the statement."

2 MR. EVANSON: And that would go in both the
3 inducing breach of contract and in the intentional
4 interference with prospective economic advantage.

5 THE COURT: Give me a moment.

6 MR. EVANSON: Okay.

7 THE COURT: Okay. That will be added.

8 And what's the other one and where does it go?

9 MR. EVANSON: So that change is -- will be the
10 same in both the inducing breach and the intentional
11 interference claims.

12 Both instructions now contain that same
13 sentence, or substantially similar sentence.

14 "To satisfy this element, a misrepresentation
15 must be communicated to the customer," et cetera.

16 So add that same clause to the end of that
17 sentence in both instructions.

18 THE COURT: Okay. All right.

19 Anything further?

20 MR. EVANSON: There were two other changes, Your
21 Honor, to the instructions that we didn't discuss this
22 morning at the hearing.

23 The one is on the defendants' profits. We had
24 briefed this before, and Oracle put in its objections to
25 Your Honor's instructions that if the infringement is found

1 to be willful, then defendants' expenses are not to be
2 deducted from the revenues?

3 THE COURT: Yes.

4 MR. EVANSON: And we didn't file a reply brief
5 because Your Honor had instructed us not to, but we had
6 briefed that in the past, and we -- you know, we don't
7 agree that that's the correct statement of the law.

8 We didn't talk about it this morning, that's why
9 we didn't make the argument, but the statute says profits.
10 And there is some dicta in one case, the *Frank* case from
11 the Ninth Circuit, which district courts have not followed.

12 There's a published decision called *ZZ Top*. I
13 can get you the citation if you --

14 THE COURT: You say you briefed it before. Can
15 you identify the document number and the pages?

16 MR. EVANSON: Yes. I've got that right here.
17 It's in our trial brief. That's docket 739, at page 12.

18 THE COURT: Just a moment.

19 MR. EVANSON: And we briefed it in our
20 opposition to or objections to Oracle's proposed jury
21 instructions. That's docket 766 at page 39.

22 And then it's also in our reply brief in support
23 of the jury instructions at docket 773 at page 12.

24 And it's substantially the same argument in each
25 place --

1 THE COURT: Okay.

2 MR. EVANSON: -- that even if the conduct is
3 willful, you don't -- the defendant still gets to deduct
4 expenses from profits in determining the infringer's
5 profits award because the statute says profits, not
6 revenues.

7 THE COURT: Okay. And what's the title of the
8 instruction where we put that language in?

9 MR. EVANSON: Copyright Infringement - Damages -
10 Defendants' Profits.

11 MR. RUSK: Page 40, Judge.

12 THE COURT: All right. I'll take another look
13 at it and let you know.

14 MR. EVANSON: And then I have one more. I'm
15 sorry to burden you.

16 THE COURT: That's all right.

17 MR. EVANSON: The last one is the causation
18 instruction.

19 And when we were -- Your Honor heard argument on
20 this this morning, and this was the D-20 instruction that
21 Your Honor had in the initial set that's now not in this
22 set.

23 THE COURT: Okay.

24 MR. EVANSON: And when we were talking this
25 morning, we were talking about that last sentence in the

1 instruction that said that causation must be proven for
2 every single client or every single customer.

3 THE COURT: Yes.

4 MR. EVANSON: We didn't talk about, you know,
5 the paragraph that came before it, which I think is an
6 absolutely correct statement of the law. And we think that
7 that needs to be in there, even if Your Honor doesn't
8 include that last sentence which is what Oracle was
9 objecting to.

10 Because that first paragraph put in the but-for
11 causation standard. You know, this -- the current
12 instruction, the copyright infringement - damages causation
13 instruction, only talks about substantial factor, it
14 doesn't mention the but-for standard.

15 And as we argued this morning, I mean, the
16 causation standard is -- it's but-for and then also a
17 causal nexus.

18 So we think that at the very least the first
19 paragraph from D-20 that was in Your Honor's initial set of
20 instructions needs to be given even if you don't give that
21 last sentence that we were talking about this morning.

22 MR. RINGGENBERG: If I could just address that
23 briefly, Your Honor.

24

25

1 That last sentence of the causation instruction
2 in the Court's current draft says,

3 "Conduct is not a substantial factor in causing
4 harm if the same harm would have occurred without that
5 conduct."

6 Making clear, if -- you know, the conduct would
7 have occurred anyway, there's no causation, no damages.
8 And there's no reason to repeat that in an entirely
9 separate instruction. It's covered.

10 THE COURT: Okay. I'll take a look at it.

11 All right. Anything else, Mr. Evanson?

12 MR. EVANSON: That's all we have on the jury
13 instructions.

14 Mr. Reckers is prepared to talk about the
15 verdict form if Your Honor wants to talk about that.

16 THE COURT: Okay.

17 MR. RECKERS: Just real briefly, Your Honor. On
18 the verdict form, looking over the Court's proposal, one
19 issue that we see when --

20 THE COURT: Wait. Just a minute. Let me turn
21 to that.

22 Now, where are you again?

23 MR. RECKERS: In the Court's proposed verdict
24 form.

25 THE COURT: Yes.

1 MR. RECKERS: And this is a general comment.

2 As we went through, and we see the number of
3 specific line items for -- asking for damage amounts, in
4 particular for the --

5 THE COURT: Tell me what page you're on.

6 MR. RECKERS: It's starting on page 4, Your
7 Honor, question 6-A, lost profits, and really continuing on
8 for the next several pages.

9 We see for -- a number of specific
10 interrogatories directed to breaking down the alleged
11 damages by product line and documentation and such for the
12 various theories.

13 And then ultimately at the end, coming to the
14 question -- skipping forward to page 18, questions 23 and
15 24, from our perspective, sort of created this -- let me
16 wait for Your Honor to get there --

17 THE COURT: I guess we're just talking about
18 different pagination here because I don't have a page 18.

19 MR. RECKERS: Okay. It's questions 23 and 24.
20 The section heading is nonduplicative damages.

21 THE COURT: Okay. So I'm up with you now.

22 So tell me again what the point is here.

23 MR. RECKERS: The issue is, Your Honor, that
24 we've got a number of specific questions directed to
25 essentially the same total harm, and so the jury's going to

1 be left with the position to filling in specific amounts
2 and then getting to these questions and then trying to
3 figure out what to do with all the numbers that they've
4 already put down earlier in the form.

5 And from our -- from our -- you know, our
6 position is that it's unduly complicated, and we had
7 proposed a simpler version, page 14 of Rimini's, where we'd
8 asked basically at the end for total damages.

9 And just seems like -- again, I don't mean to
10 reargue the point, Your Honor, but our proposal, I think,
11 solved some of the confusion that we think is manifest in
12 the form that's proposed currently by the Court.

13 We just ask the Court to look at page 14 of our
14 proposal, and the way that we handled the damages, and to
15 avoid a confusing situation where the jury is left to try
16 to try to decide what to do with the numbers they already
17 put down.

18 And that's really all I have on that point, Your
19 Honor.

20 THE COURT: Okay. All right.

21 Any input with regard to that issue on behalf of
22 plaintiffs?

23 MR. ISAACSON: I'm not following the proposal,
24 frankly.

25 So what would you want the nonduplicative

1 damages to say?

2 MR. RECKERS: What we proposed was basically
3 having a total for copyright damages, and then it was
4 broken down on page 14 where you have questions as to --
5 for Rimini and Ravin and grand total of damages.

6 And then obviously the computer fraud damages
7 are handled separately because those are a separate harm.

8 But the rest of the damages that the allegation
9 is essentially the same harm, same economic harm, go under
10 different theories.

11 And so that's why our proposal is that we just
12 ask for the damages essentially once, where they are
13 presented as the same economic harm.

14 MR. ISAACSON: I'm not sure that there is a
15 substantive difference between that and what the Court is
16 proposing.

17 The Court is proposing in question number 3
18 nonduplicative damages for Oracle America and then
19 nonduplicative damages for Oracle International. And those
20 are the two plaintiffs.

21 I guess you're saying let's break it down even
22 further to copyright and noncopyright, which seems to me
23 more complicated. But maybe I'm missing something.

24 MR. RECKERS: Exactly. So if we go to 6-A, back
25 on what I have as page 4, we have a list of damages for

1 those particular -- by product line for lost profits.

2 Then 6-B is defendants' profits, again for all
3 of the product lines.

4 Then we have fair market value, again with a set
5 of 6 questions as for amount of damages.

6 Continuing to question 7, again, the same set of
7 numbers.

8 Question 8, the same set of numbers of --
9 request for damage amounts.

10 And then -- so we now have -- I don't know how
11 many that is, but that's, you know, several dozen numbers
12 that the jury has to fit in.

13 And, you know, our simple observation is that
14 when you have that number of blanks to fill in with
15 numbers, then it's going to be hard for them then to --
16 going forward, to number 23, and -- 22 and 23, and figure
17 out what they're going to do with those numbers.

18 MR. ISAACSON: I think I understand the
19 argument.

20 But the earlier damages, as Elizabeth Dean
21 testified, do overlap, and she gave the nonduplicative
22 numbers. And it's important, if you're going to go through
23 the other ones individually, that you reach a conclusion
24 about the nonduplicative numbers. It's certainly helpful.

25 MR. RECKERS: It's simply a practical

1 consideration, Your Honor. You know, I'd submit it for
2 Your Honor's consideration.

3 MR. ISAACSON: Usually I'm a big fan of reducing
4 the verdict form, but I think in this case the practical
5 answer is you need the nonduplicative questions.

6 THE COURT: Well, we're all a big fan of that.

7 I sent this out because I knew we needed to
8 discuss it. So I appreciate the comments.

9 And it occurs to me -- do you need to have this
10 form finalized before closing statements? Because we'll
11 have time tomorrow after this case is submitted.

12 But it could be that you want to work on the
13 form with your closing statements, and, if that's the case,
14 we can work it out tonight.

15 MR. ISAACSON: Yes, Your Honor.

16 In fact, one of our reactions to this is so --
17 it's important, I think -- I know to our closing statement,
18 and I would be surprised if it isn't important to their
19 closing statement, to tell the jury how we feel the verdict
20 form should be filled out.

21 THE COURT: Okay.

22 MR. ISAACSON: And one reaction I had to this
23 was that there's going to be a section of closing argument
24 that's not very necessarily interesting or argumentative
25 but rather scrivener-like as we write things down for the

1 jury and give them time to write it down.

2 And so I think on that basis we would like
3 another 15 or 20 minutes for both sides for argument so
4 both sides have the ability to do that. It's a 15- or
5 16-page -- it's a 16-page form as we printed out, and a
6 little longer in some other formats.

7 And we literally will sit there -- and you can't
8 rush through that because there's going to be some long
9 numbers --

10 THE COURT: No, I'm sympathetic to that problem.
11 I'm willing -- if you're both requesting 15 more
12 minutes, I'll give it to you.

13 MR. ISAACSON: Okay. Thank you, Your Honor.

14 One other reaction we had to the verdict form
15 was on page 3, after question 6. The way the verdict form
16 is structured, that -- is the jury makes a choice between
17 lost profits and fair market value license, and then,
18 depending on that choice, only fills out the numbers for
19 one or the other.

20 And given the parties' legal disagreements about
21 that issue, I think it would be prudent if the jury filled
22 out both regardless, so that the -- so that -- so, for
23 example, you, Your Honor, after the trial, would know where
24 the jury stood on -- you know, on the damages on those two
25 different issues.

1 THE COURT: Okay. I understand.

2 MR. ISAACSON: And then one point I would raise
3 about the instructions that we did not raise earlier, at
4 the end of the punitive damages instruction, which on our
5 printout is page 81, says,

6 "If you decide that punitive damages should be
7 awarded against the defendant, a limited hearing will
8 follow the return of your verdict, in which the parties may
9 present relevant evidence bearing upon the amount of
10 punitive damages."

11 And while that is certainly truthful, we do feel
12 we're entitled to punitive damages, and we don't want to
13 give the jury the sense that they can get out of here if
14 they say no.

15 And so I think it would be prudent to leave that
16 out for now.

17 THE COURT: All right. Well, I appreciate your
18 request, but I've been down that road before, and I don't
19 like to shock the jury.

20 MR. ISAACSON: Okay.

21 THE COURT: But I'll look at the language to see
22 if there's some more objective way to present it that it
23 might not tend to discourage them just due to factors of
24 time.

25 MR. ISAACSON: Thank you, Your Honor.

1 MR. HIXSON: And, Your Honor, while we're on
2 that instruction about punitive damages, the Court added a
3 sentence about punitive damages not being available for
4 copyright infringement?

5 THE COURT: Yes.

6 MR. HIXSON: But there's a typo in the sentence.
7 It says no available rather than not available.

8 THE COURT: Oh.

9 MR. HIXSON: In the event, that there's
10 attention on that --

11 THE COURT: Good. I'm glad you brought that to
12 my attention.

13 What page number are we on? Your pages are the
14 same --

15 MR. HIXSON: Oh, it's my page 133, but I bet
16 that has nothing to do with your page number.

17 THE COURT: It has nothing to do with it, you're
18 right.

19 MR. EVANSON: I'm on page 133.

20 THE COURT: Well, we know where it is. We'll
21 find it.

22 MR. HIXSON: Thank you.

23 MR. ISAACSON: Just a -- I mean, we were able to
24 get this printed out shortly before coming over here. We
25 cannot tell you that we have proofread this.

1 I guess it's not going back with the jury, the
2 instructions? You're going to be reading it. I don't know
3 if -- so I don't know if typos --

4 THE COURT: I will send the instructions back
5 with the jury.

6 MR. ISAACSON: Okay.

7 THE COURT: And I will actually send at least
8 four copies back to the jury.

9 MR. ISAACSON: All right. So if we --

10 THE COURT: Possibly five.

11 MR. ISAACSON: If we or defense see any
12 nonargumentative typos, we will, I guess, e-mail the Court
13 and let you know?

14 THE COURT: Yes, that's good. Because we won't
15 run those copies until we're actually into argument.

16 One thing that occurred to me, we're obviously
17 all pressed a little bit with time, but the -- I don't see
18 any instructions or verdict form questions regarding
19 statutory damages, the number of copies, the amounts to be
20 attributed to the copies based upon considerations of
21 willfulness or good faith.

22 MR. ISAACSON: That actually reminds me. The
23 verdict form on statutory damages says per violation, and I
24 believe it should say per infringement -- is it per
25 infringement or active infringement?

1 MR. HIXSON: Per work.

2 MR. ISAACSON: Work. Per work.

3 Now, that is more advantageous for the defense.

4 A violation would be if a work was copied 10
5 times, each one would be a violation, but per work is once.

6 And we think that -- and I'm told quite firmly
7 we can't ask for per violation, we can only ask for per
8 work. In argument, we would only ask for per work, but we
9 might as well make the question correct.

10 THE COURT: So the word violation should
11 be changed to --

12 MR. ISAACSON: Question 11, instead of per
13 violation would be per work, or per each copyrighted work.

14 THE COURT: For each work?

15 MR. ISAACSON: Yeah. You have per violation of
16 each copyrighted work. It could be for each copyrighted
17 work. And the per violation --

18 THE COURT: Wait. Wait a minute. I just now
19 found where you were reading. So give me that again.

20 MR. ISAACSON: Question 11, which is the top of
21 my page 8, statutory damages.

22 THE COURT: Yes.

23 MR. ISAACSON: So the third line it says per
24 violation?

25 THE COURT: Yes.

1 MR. ISAACSON: And that would say for each
2 copyrighted work.

3 And then in line 5, it's the same thing, for
4 each copyrighted work.

5 And then in the last line, it's the same thing,
6 for each copyrighted work.

7 THE COURT: So you would change it how?

8 MR. ISAACSON: Instead of saying "per violation
9 of each copyrighted work," it would just say "for each
10 copyrighted work."

11 MR. EVANSON: That is infringed? The work that
12 is infringed?

13 MR. ISAACSON: It already says if you found that
14 infringement as to that particular copyrighted work.

15 I'm sorry. The amount to be awarded for each
16 violation would be -- the amount to be awarded for each
17 infringement of a copyrighted work --

18 MR. EVANSON: Would be each copyrighted work
19 infringed.

20 MR. ISAACSON: Oh, each copyrighted work
21 infringed, yes, that's right.

22 THE COURT: The amount to be awarded for each --

23 MR. ISAACSON: Copyrighted work infringed.

24 THE COURT: So in the body of the paragraph,
25 wherever the words "per violation of each copyrighted work"

1 appears, you would replace that with "for each copyrighted
2 work"; is that correct?

3 MR. ISAACSON: Yes. Oh, I see. My colleague
4 points out it should also say the total amount rather than
5 the amount. Otherwise, someone might just write down the
6 amount that they think for each work.

7 THE COURT: Okay. So at the bottom of the
8 columns there, you would have a total amount?

9 MR. ISAACSON: Yeah. So I guess to be
10 grammatical, "The total amount to be awarded for any
11 violations of the copyrighted works infringed is as
12 follows."

13 THE COURT: Okay. Now, we don't have anything
14 in there about numbers.

15 MR. RECKERS: Your Honor, we had proposed in the
16 jury instructions that we -- it's defendants' 22, that we
17 indicate that the total number of works, the maximum number
18 of works is 100, given the hundred registrations which are
19 in the jury notebook, which is the maximum. I don't know
20 if there's any dispute on that, but --

21 MR. ISAACSON: Well, you'll be delighted to know
22 that we think the number is 93. There's seven JD Worlds.

23 MR. RECKERS: Okay. So 93, I guess, would be
24 the maximum number of --

25 MR. ISAACSON: Right. I will be saying that in

1 argument.

2 THE COURT: Well, it sounds as though a
3 stipulation could be reached on the amount.

4 MR. ISAACSON: This is in their juror notebook.
5 The list of 100 is in their jury notebook. And so all that
6 needs to be done is for me to say 93 are in this case, and
7 7 are out, which I intend to say.

8 THE COURT: All right. But there still would be
9 a question --

10 MR. ISAACSON: As to whether you multiply by 0
11 or 200 or 750 or 150,000.

12 THE COURT: All right.

13 MR. RECKERS: And, Your Honor, just to be clear,
14 we're not agreeing that it's 93. I think their expert said
15 it was in the 60s.

16 But for purposes of setting an upper limit, we
17 would still propose putting in the instructions some
18 guidance on that particular point.

19 We put a hundred in our jury notebook. We would
20 be happy to put 93 and then address those registrations.

21 What we don't want is sort of the number to be
22 untethered --

23 THE COURT: No, I agree with that.

24 Why don't I leave it to you to submit to me a
25 proposed question that will solve this problem because it

1 doesn't seem to me to be complicated, and it also doesn't
2 seem to be of significant dispute. Will that work?

3 MR. ISAACSON: Yes, Your Honor. Our number is
4 93.

5 THE COURT: Okay. Well, what I'm asking for is
6 a proposed rewrite of the language in question 11 that will
7 solve these problems.

8 MR. RECKERS: Your Honor, let me sort of suggest
9 what -- how this now reads and why I think it's
10 problematic.

11 At this point the jury will have to take the
12 parties' arguments, look at the list of registrations,
13 discern which of those registrations apply to each of these
14 six or five product lines, and then discern for each of the
15 violations which -- a number between \$750 and \$150,000, and
16 then multiply those together to get each of those lines.

17 I just propose -- I suggest that it's just
18 extremely complicated to have the jury do that math and
19 divide these -- divide these up that way.

20 I suspect that we can definitely work on this
21 language. But I just put out there, it's a fairly
22 unworkable set of questions in the first instance.

23 MR. ISAACSON: I agree that counsel's trying to
24 improve the situation, and so -- and to accommodate his
25 suggestion, it could be the total amount to be awarded for

1 copyright works infringed is that -- infringed, comma, not
2 to exceed 93 copyrighted works.

3 THE COURT: Why don't I let you work on that and
4 then just let me know when you have something.

5 MR. ISAACSON: And then we'll just have one line
6 instead of five.

7 MR. RECKERS: We'll work on it, Your Honor. I
8 think we'll be able to move this forward.

9 THE COURT: Okay. All right. And I'll look at
10 the other question that was raised.

11 And as soon as you have that, let me know, and
12 as soon as I have the part we're doing, we'll let you know,
13 so we'll try and move it right along.

14 One other thing. With regard to DTX 290A that
15 had all the entries that contained numerous hearsay
16 objections and concerned admissibility, and the Court
17 indicated it would have a ruling. We've done that.

18 Madam Clerk, I'm going to give you this copy of
19 DTX 290A and ask that you provide a copy for each side, and
20 they can work on the exhibit accordingly.

21 As to the other related pieces, we just haven't
22 finished those yet. So we'll be getting to those -- I see
23 you're wondering what I'm referring to, Mr. Isaacson. And
24 so --

25 MR. ISAACSON: No, no, I'm sorry. Don't

1 misinterpret my look. It's been a long day.

2 THE COURT: All right. It has been.

3 But I'll get that to you as soon as we can.

4 So let's -- we have a game plan?

5 MR. RINGGENBERG: Your Honor, we have two other
6 evidentiary issues we wanted to raise while we had you,
7 just before closing.

8 THE COURT: Yes.

9 MR. RINGGENBERG: I'm sorry to do it.

10 One of which is we moved -- as part of our
11 rebuttal case, we moved into evidence Plaintiffs'
12 Exhibit 609. The only objection was the defendants'
13 continuing objection to anything referring to TomorrowNow,
14 and the Court had never ruled on whether it's admissible or
15 not.

16 THE COURT: No, I have -- oh, go ahead.

17 MR. RINGGENBERG: So I was going to ask for a
18 ruling so we could determine whether or not we can use it
19 in closing.

20 THE COURT: Aren't those the ones you gave me,
21 Dionna?

22 COURTROOM ADMINISTRATOR: Yes, Your Honor.

23 THE COURT: I'm working on those as well.

24 MR. RINGGENBERG: Very good.

25 And there's also an issue about a deposition

1 quote that was played during the examination of Mr. Ravin,
2 and I want to make sure that that's on the Court's radar
3 screen as well, whether you discussed it with him, whether
4 I should address it with the Court.

5 COURTROOM ADMINISTRATOR: You should address
6 that on the record.

7 MR. RINGGENBERG: Okay. So the issue, Your
8 Honor, is during the examination of Mr. Ravin, we played
9 for the jury a video clip from Mr. Ravin's deposition. And
10 because the page and line cite said out loud was off, the
11 current transcript doesn't have the portion of the
12 deposition clip that was actually played in court for the
13 jury.

14 (Discussion held off the record.)

15 MR. RINGGENBERG: I thought it was read. In any
16 event, the words -- I thought it was video, but it may have
17 just been read out loud, but the words don't match. And
18 that was our error because the cite said out loud in court
19 wasn't correct.

20 So what we proposed to do is to -- the words
21 we -- we propose to try to get the transcript corrected are
22 in addition so that the words the jury heard are reflected
23 in the official transcript.

24 And for the record, the portion I'm referring to
25 is at the official transcript 823, 24 to 824, 6.

1 And the portion of the transcript that was
2 actually read or played was from Mr. Ravin's deposition
3 347, 14, to 348, 9.

4 I don't know the date of the deposition. But
5 all of the Ravin transcripts are consecutive, so that's a
6 clear reference.

7 And I don't think there's any question actually
8 as to what was said in court. I think we agree with that
9 on either side, at least as far as I understand it.

10 THE COURT: So as far as the record is
11 concerned -- the most the record can do is identify the
12 mistake that was made at the time, and the record will
13 stand as it appeared at the time.

14 MR. RINGGENBERG: I think that's right. We'd
15 just like to make sure that the official transcript
16 reflects the words that were read to the jury or played to
17 the jury at some point, understanding that the transcript
18 from that day can't be changed going backward.

19 THE COURT: I see. And there's no dispute about
20 what was played; is that correct?

21 MR. RINGGENBERG: That's my understanding,
22 although -- I can show them the exact transcript. I'm sure
23 they will recall the testimony. Because the part that's in
24 the transcript just doesn't match what was being discussed
25 with Mr. Ravin in that part of his exam.

1 And, again, I don't want to place -- I'm not
2 trying to blame the court reporter. There's a reason for
3 it, which was the cite that was read was incorrect.

4 THE COURT: I understand. I just want to make
5 sure the transcript reflects what was actually presented
6 before the jury. And this clarification with regard to the
7 mistake on the identification of the transcript location is
8 explained by what you've just said.

9 MR. RINGGENBERG: Very good.

10 And so I will confer and show defense counsel
11 precisely the page and line we're talking about and make
12 sure we're all on the same page, and then we can submit
13 that to the Court.

14 Thank you, Your Honor.

15 THE COURT: Okay. Anything else? It's a work
16 in progress.

17 MR. ISAACSON: If your clerk waits a minute, we
18 could meet and confer right now about the question whatever
19 is 11 and give agreed language so that you don't have to
20 wait for that.

21 Because I think what we were dictating out loud
22 we'd finalize in about a minute or two.

23 THE COURT: Run it off somewhere and give it to
24 Dionna or, if you want --

25 MR. ISAACSON: All right. We will do that.

1 THE COURT: If you'd like a court reporter to do
2 it, she'll run it off as well.

3 MR. ISAACSON: Sometimes we hand edit.

4 THE COURT: Okay. I think we have an
5 understanding.

6 COURTROOM ADMINISTRATOR: Please rise.

7 (Recess from 4:26 p.m. until 5:55 p.m.)

8 (Outside the presence of the jury.)

9 THE COURT: All right. Have a seat, please.
10 The record will show we're in open court.
11 Counsel are present, the jury is not.

12 You've been provided with a set of -- final set
13 of -- a proposed set of final instructions. I'm pretty
14 sure this will be exactly what will be given.

15 But to explain pages that are different -- first
16 of all, most significantly to Defendants Rimini, you've
17 persuaded me with regard to the willfulness argument
18 insofar as it having an effect upon profits.

19 My view is that the statute defines profits.
20 It's clear on its face. For the Court to redefine what
21 profits should be is a step that this Court is not prepared
22 to take.

23 Personally I believe that willfulness should
24 count, and that gross revenues, rather than net profits,
25 should apply where willfulness is present. But under the

1 circumstances, I believe that the law does not permit that.

2 I added the reliance language in instructions
3 number 37 and 38 that was agreed upon by the parties.

4 I modified the causation language in instruction
5 number 30 pursuant to the discussion in court.

6 And in instruction number 62 on punitive
7 damages, I added a sentence that is intended to advise the
8 jury that if they feel punitive damages are warranted, that
9 the fact that an additional hearing may be necessary should
10 not bear upon their decision in any way.

11 We've also submitted a verdict form. I have not
12 given this a final review and approval, but I believe it
13 reflects the discussions that were held in court and to
14 which there was general agreement.

15 Essentially this form has been simplified as a
16 result of the discussion in court, and I believe it
17 encapsulates what everyone was concerned about.

18 There are some remaining rulings that were
19 agreed upon by everyone, and those have been brought to
20 the -- my attention by my court clerk.

21 First of all, with regard to Exhibits PTX 609
22 and PTX 2152, I reserved ruling on those at the time. I've
23 gone back over them, and my ruling is they are both
24 admitted.

25

1 (Plaintiffs' Exhibits 609 and 2152 received
2 into evidence.)

3 THE COURT: With regard to the defendants'
4 exhibit -- before we took our last break I provided you a
5 copy of 290A, which has various redactions that were
6 proposed. A number of those redactions I indicated the
7 Court ruled that they should not be included in the
8 exhibit. I wrote the word "out" to the side of what should
9 be taken out, and I understand that counsel are resolving
10 the exhibit.

11 With regard to DTX 152, it also contained a
12 number of objectionable portions that were identified to
13 the Court.

14 I have ruled on those now, and I'm providing the
15 court clerk with a copy of DTX 152 with that part of the
16 exhibit to which there were objections raised, and I have
17 written the words "out" or "in" next to each item that the
18 Court reviewed that I felt should be excluded or should be
19 included.

20 So I'll give that to my court clerk and request
21 that she provide copies to the parties, and that will be
22 the Court's ruling with regard to that exhibit.

23 MR. HIXSON: Your Honor, may I ask a question
24 about that?

25 THE COURT: Yes.

1 MR. HIXSON: With respect to DTX 152, 153, 154B,
2 164A, 340 and 345, the Court does not have in front of it
3 all of Oracle's proposed redactions because the parties met
4 and conferred in advance of the motion and agreed that we
5 would present exemplar proposed redactions rather than
6 burdening the Court with all of the many that Oracle would
7 propose.

8 And so I just want to make sure the Court
9 understands that those are exemplars the parties meant to
10 extrapolate from the Court's ruling. We have not put
11 before Your Honor, because there were so many, all of the
12 proposed redactions on those exhibits.

13 THE COURT: Okay. I did not realize that.

14 So when do we get them?

15 MR. HIXSON: I'm sorry. I missed the Court's
16 question.

17 THE COURT: When do I get all of the proposed
18 redactions?

19 MR. HIXSON: We can provide those at any time.

20 We had understood in meeting and conferring with
21 defendants that we would be seeking the Court's guidance on
22 that.

23 It was their motion. And the process that the
24 parties came up with were these exemplars.

25 THE COURT: Well, my problem is I'm confusing

1 different exhibits. Tell me what you still will need
2 rulings on.

3 MR. HIXSON: We are for -- DTX 292, 274 and 345,
4 the Court has the complete set of --

5 THE COURT: 292, 274, and 345?

6 MR. HIXSON: Yes. Those were outside of the
7 motion. Sorry, 345 was in the motion and outside of it,
8 and so the Court does have Oracle's complete proposed
9 redactions for those.

10 But for the others, the motion as framed for
11 152, 153, and so on, it simply never asked the Court to
12 evaluate all the proposed redactions, it was just a sample
13 set.

14 THE COURT: So what, if anything, has been done
15 with regard to 152, 153?

16 MR. HIXSON: The parties have put before the
17 Court the sample set of proposed redactions, and I don't
18 believe anything further has been done.

19 THE COURT: Okay. So are the -- I guess I
20 should have it here in front of me. We're talking about
21 152 and 153?

22 MR. HIXSON: And 154B, 164A, and 340.

23 THE COURT: Well, I need those.

24 Does the court clerk have those? Is that what
25 you're telling me?

1 MR. HIXSON: What I believe is what the parties
2 submitted in connection with the filing was just the
3 exemplar redactions and not the redactions to the entire
4 exhibit.

5 So that's a way of saying, no, I don't believe
6 the court clerk has the complete set of proposed
7 redactions.

8 COURTROOM ADMINISTRATOR: I don't have anything.

9 THE COURT: Well, I don't really even know what
10 you're talking about. So I'm going to need those. Whether
11 the court clerk has them or counsel has them, these are
12 proposed redactions by -- that are agreeable to both sides
13 or only by one side?

14 MR. HIXSON: These are proposed by Oracle and
15 not agreed to by defendants.

16 And I can e-mail them to the clerk tonight with
17 the complete set of redactions.

18 COURTROOM ADMINISTRATOR: We need hard copies to
19 go to the jury if they should get admitted.

20 MR. HIXSON: I understand. We're not seeking to
21 admit them, and it's not our motion to admit them, so we
22 did not go through that exercise.

23 THE COURT: So it's defendants' motion to admit
24 them, and Oracle is objecting with regard to the redacted
25 materials?

1 MR. HIXSON: Yeah. And it's defendants' motion.
2 We have objected to their motion. And in
3 advance of the filing, the parties met and conferred and
4 agreed that we would each discuss sample proposed
5 redactions rather than all of the ones that would be at
6 issue with those documents just given the large volume of
7 them.

8 THE COURT: Well, I need the -- I need the total
9 exhibit that shows the redactions requested by Oracle and
10 shows how the exhibit would appear without the redactions,
11 and that's what I don't have.

12 MR. HIXSON: I am -- I can provide those to the
13 clerk in the morning in paper copy and e-mail them tonight.

14 THE COURT: Okay. Well, I'm prepared to rule on
15 them tomorrow, assuming that they're not going to affect
16 closing arguments.

17 MR. HIXSON: Okay. Thank you, Your Honor.

18 THE COURT: Okay.

19 All right. So that -- so that I have the
20 numbers straight it's 152, 153, 154B, 164A, and 340; is
21 that correct?

22 MR. HIXSON: That's correct.

23 THE COURT: Now, with regard to 345, there were
24 a number I had in the front of me, Exhibit 345, and there
25 were red tabs which indicated pages with objections?

1 MR. HIXSON: I believe that for DTX 345, 292,
2 and 274, the Court has the complete set of proposed
3 redactions.

4 THE COURT: Okay. Well, with regard to 345, I
5 have ruled on that, and I've indicated if a proposed
6 redaction is to stay in, I've written the word "in." If
7 it's to be removed, I would have written the word "out."

8 But it looks as though -- I mean, a quick
9 review, I may have ruled everything stays in. I see an
10 "out" here.

11 So, in any event, I'll ask my court clerk to
12 provide you with copies of that on both sides, and the
13 exhibit can be prepared accordingly. That was number 345,
14 Dionna?

15 COURTROOM ADMINISTRATOR: Yes, Your Honor.

16 THE COURT: Okay. Now, I -- 292 -- I couldn't
17 place 292, candidly, when I looked at it. Can anyone fill
18 me in on where we were on that?

19 MR. HIXSON: This is a deposition exhibit to
20 Richard Cummins' deposition, and I have the -- I guess the
21 with and without redaction versions that we provided to the
22 Court with me if that's of assistance.

23 THE COURT: It would be.

24 MR. HIXSON: With redactions. Without
25 redactions.

1 THE COURT: I'm going to have to look at that,
2 but we will certainly advise you where we are on it by
3 morning.

4 Is there any critical need for it tonight?

5 MR. HIXSON: Not from us.

6 MR. RECKERS: Not from us either, Your Honor.

7 THE COURT: Okay.

8 COURTROOM ADMINISTRATOR: I did provide you with
9 290A, correct, with the judge's comments?

10 MR. RECKERS: Yes, ma'am.

11 THE COURT: Okay. Now, DTX 374. Can someone
12 tell me what that is?

13 COURTROOM ADMINISTRATOR: 274; right?

14 THE COURT: It's 274?

15 MR. HIXSON: Yeah. This is another deposition
16 exhibit to the deposition of Oracle's Rick Cummins, and,
17 again, I have the versions with and without redactions.

18 THE COURT: Okay. All right. If you can
19 deliver that. We'll do the same with that.

20 And these were associated with which deposition
21 did you say?

22 COURTROOM ADMINISTRATOR: Cummins.

23 THE COURT: Cummins?

24 MR. HIXSON: Yes, with Cummins.

25 THE COURT: Yeah, okay. And it's indicated

1 there.

2 I had looked at that briefly. Okay.

3 Okay. I'll have to rule on it. I see now what
4 the issue is.

5 164A?

6 MR. HIXSON: That is the similar issue with
7 respect to 152 and 153. It's part of that motion where we
8 just give you samples. So we'll provide the complete
9 proposed redactions to the Court.

10 THE COURT: Okay. So you'll provide that, and
11 that will be pending ruling from the Court; is that
12 correct?

13 MR. HIXSON: Yes, Your Honor.

14 THE COURT: So with regard to pending rulings, I
15 have 292, 274, and 164A; is that correct?

16 MR. HIXSON: As well 152, 153, and 154B, because
17 those were the sample issue as well.

18 COURTROOM ADMINISTRATOR: And 164A; correct?

19 MR. HIXSON: Yes.

20 COURTROOM ADMINISTRATOR: Okay.

21 MR. HIXSON: And 340.

22 THE COURT: All right. Well, again, I guess I
23 have to give you rulings on those in the morning.

24 So you'll need rulings in the morning on 152,
25 153, 154B, 292, 274, 164A, and that should resolve it; is

1 that correct?

2 MR. HIXSON: And 340.

3 THE COURT: Oh, and 340 as well?

4 Okay. All right. Well, make sure I have a
5 package of all of that. You just gave me which ones, with
6 regard to 292 and 274; is that correct?

7 MR. HIXSON: Yes, Your Honor.

8 THE COURT: And you're still -- and you are yet
9 to provide me with the ones for the others; is that
10 correct?

11 MR. HIXSON: Yes.

12 THE COURT: So the ones that you will provide
13 me -- when am I going to receive these?

14 Let's see, I have one of them now, don't I? No,
15 the two I just mentioned, 274, and 292. So you're going to
16 provide me with 164A --

17 MR. HIXSON: With 152, 153, 154B, 164A, and 340.

18 THE COURT: Okay. All right.

19 Are there any other rulings that are out there
20 that we haven't mentioned?

21 MR. HIXSON: I'm not aware of any.

22 THE COURT: Think we've got it?

23 MR. RECKERS: No, Your Honor.

24 THE COURT: All right.

25 Okay. I think the verdict form should be

1 acceptable, but if it's not, someone should let my court
2 clerk know, and we'll try to deal with that just as quickly
3 as we can.

4 MR. EVANSON: Would you like to deal with that
5 now or in the morning, Your Honor?

6 THE COURT: In the morning.

7 MR. EVANSON: In the morning.

8 THE COURT: Okay. Because I think it's going to
9 be okay. But if it's not, make sure we know about it and
10 we'll deal with it, we'll deal with it then.

11 MR. EVANSON: Okay. We have a few issues.
12 Would you like a filing or just -- we can do it orally in
13 the morning?

14 THE COURT: It would be helpful to have a filing
15 ahead of time, but keep it brief and to the point, and
16 don't argue anything that you have argued already.

17 MR. EVANSON: Okay. We'll do that.

18 THE COURT: All right. I think we've got it.
19 I'll wish you gentlemen a pleasant evening. At least we're
20 getting close to the end. Thank you.

21 (The proceedings adjourned at 6:17 p.m.)

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I certify that the foregoing is a correct
transcript from the record of proceedings
in the above-entitled matter.

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Donna Davidson, RDR, CRR, CCR #318 Official Reporter	10/6/15 Date

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609 and 2152		3326